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No. 03-556

In the Supreme Court of the United States

SHIRLEY STOLL,

Petitioner,

v.

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED
BY PETITION FOR REVIEW

Whether section 204(b)(4)(A) of ERISA, 29 U.S.C. §1054(b)(4)(A), requires pre-ERISA years of service before a break in service to be counted for benefit accrual purposes, despite contrary plan provisions, and despite the fact that it was legal to disregard such years of service under pre-ERISA law.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent The Western and Southern Life Insurance Company is a wholly-owned subsidiary of Western and Southern Financial Group, which is a wholly-owned subsidiary of Western-Southern Mutual Holding Company, a privately held company. No publicly held company owns 10% or more of the stock of The Western and Southern Life Insurance Company, Western and Southern Financial Group or Western-Southern Mutual Holding Company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Western and Southern Life Insurance Company (hereinafter "Respondent"), respectfully requests that this Honorable Court deny Petitioner's request that a writ of certiorari be issued to review the unpublished, unanimous decision of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") entered on May 22, 2003. Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc was denied by the Sixth Circuit on July 17, 2003.

The sole issue presented by the present Petition was never properly raised below or ruled upon by the lower courts. For this primary reason, and for the other important reasons set forth below, no compelling grounds exist for this Court to exercise certiorari jurisdiction.

STATUTES INVOLVED

The question presented by the Petition involves interpretation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.* ("ERISA"). In supplement to the statutory excerpts reproduced in the Appendix to the Petition, additional statutory excerpts that are relevant to consideration of the Petition or the substantive issue presented by Petitioner are set forth in the Appendix to this Brief in Opposition (hereinafter "Opposition, Apx."). (Opposition, Apx. B at 24a-27a; C at 28a-29a; and D at 30a-33a).

STATEMENT OF CASE

Petitioner's Statement of the Case is incomplete in its description of the Pension Plan provisions and record facts

that are material to the substantive issue presented by the Petition. In addition, the Petition mischaracterizes the issues considered and ruled upon by the lower courts insofar as it suggests that the issue presented by the Petition was ever properly raised or ruled upon below.

I. Record Facts And Pension Plan Provisions

Petitioner began working for Respondent in June of 1954. (Petition, Apx. 2). In February of 1969, her employment was terminated pursuant to Respondent's then-existing policy, lawful at that time, not to permit employment to continue past the twentieth week of an employee's pregnancy. (Petition, Apx. 2).

The provisions of Respondent's Pension Plan in effect at the time of Petitioner's termination in 1969, before ERISA was enacted, provided that Petitioner would not receive service credit for her prior period of employment if she were rehired.[1] Petitioner's Statement of the Case ignores these Plan provisions, which provided that a Plan member's benefits under the Pension Plan were based on the member's "last period of uninterrupted employment . . . commencing with the date of such employment and ending with the date of termination of such employment." (Petition, Apx. 3, 14-15). Because the Pension Plan only counted a member's last period of uninterrupted service in determining retirement annuity benefits, once Petitioner left Respondent in 1969, her period of service from 1954 through 1969 could never be added to

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[1] The most significant Pension Plan provisions with regard to Petitioner's claim for benefits are set forth in the Sixth Circuit's decision and need not be repeated here in their entirety. (*See* Petition, Apx. 1-17).

any subsequent period of service for purposes of calculating her pension benefit. (*Id.*)

Furthermore, pursuant to the terms of the Pension Plan, Petitioner was not vested in any benefit when her employment terminated in 1969. Under the terms of the Plan, which satisfied all relevant Internal Revenue Code provisions at the time, Petitioner could have become vested in some benefit rights only upon attaining age thirty-five with ten years of employment. (Petition, Apx. 2-3, 14-15). Petitioner's Statement of the Case ignores this requirement and the fact that although Petitioner had more than ten years of service when she left in 1969, she was only thirty-three years of age, and was therefore not vested in any benefit under the Pension Plan. (*Id.*)

Petitioner was rehired by Respondent in 1981, and retired in December of 1996. (Petition, Apx. 3-4). She requested that her initial period of employment before her break in service be counted for purposes of calculating her pension benefit. However, the Pension Plan in effect at the time of Petitioner's retirement expressly provided that "years of Service completed before January 1, 1976 will not be added to years of Service completed after any Break in Service." (Petition, Apx. 4-5, 14). Pursuant to these Pension Plan terms and the terms of the Pension Plan in effect in 1969, Respondent denied Petitioner's claim. (Petition, Apx. 13-15).

II. Issues Raised Below And Ruled Upon By The Lower Courts

The issues raised by Petitioner below at both the District Court and Appellate levels did not include the issue raised in the present Petition. The four issues raised before the United States District Court for the Southern District of Ohio were:

(1) whether Petitioner was entitled to the benefits at issue under the terms of the Pension Plan; (2) whether Respondent breached its fiduciary duty by denying benefits in contravention of the Pension Plan; (3) whether Respondent failed to provide required Pension Plan documents; and (4) whether Respondent failed to comply with ERISA's procedural requirements in the handling of Petitioner's claim. (Petition, Apx. 7, 16, 19-20; Opposition, Apx. A at 8a-9a).[2] The District Court ruled in favor of Respondent on all of Petitioner's claims. (Petition, Apx. 7-8, 19, 30-31; Opposition, Apx. A at 15a-23a).

On appeal, Petitioner raised three issues in her brief to the Sixth Circuit: (1) whether alleged procedural irregularities in Respondent's handling of Petitioner's claim entitled her to *de novo* review of the substantive benefits decision; (2) whether Respondent acted arbitrarily and capriciously in interpreting the terms of the Pension Plan and denying Petitioner's claim for benefits; and (3) whether Respondent breached its fiduciary duty by enforcing Plan terms that violate the minimum vesting standards set forth in 29 U.S.C. §§ 1053(b)(1), 1052(b)(5)(A) and Internal Revenue Code §§ 411(a)(3)(C) and 411(a)(4). (Petition, Apx. 8, 15-16; *See* Petitioner's Appellate Briefs, Opposition, Apx. G at 41a, 52a-53a; 68a-82a; H at 102a, 106a-115a).

The Sixth Circuit – in the decision now challenged by the Petition – rejected Petitioner's contention that the substantive

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[2] The Appendix to the Petition includes the District Court's March 20, 2001 Order denying Petitioner's procedural cause of action in the case, but does not include the District Court's separate September 29, 1999 Order denying Petitioner's substantive claims for benefits. A copy of this Order is included in the Appendix to this Brief in Opposition. (Opposition, Apx. A at 1a-23a).

benefits decision was subject to *de novo* review and affirmed the District Court's judgment that Respondent's denial of Petitioner's claim was not arbitrary and capricious in light of the terms of the Pension Plan. (Petition, Apx. 9-15). The Court noted that Petitioner's "arguments on appeal differ[ed] significantly from the arguments she presented to the district court," and expressly declined to consider the "contorted" breach of fiduciary duty issue raised in Petitioner's brief on the grounds that it "share[d] a label, but nothing else, with the argument ruled on by the district court." (Petition, Apx. 8, 16).

REASONS TO DENY PETITION

I. The Issue Presented By The Petition Was Never Properly Raised Below Or Ruled Upon By The Lower Courts.

The sole issue presented by the Petition is whether section 204(b) of ERISA, 29 U.S.C. § 1054(b), requires Respondent to count Petitioner's pre-ERISA years of service, prior to her break in service, for purposes of determining the amount of her pension benefit. (Petition, 3-9). Petitioner now contends that section 204(b)(4)(A) of ERISA, and incorporated section 202(b)(1), require these pre-ERISA years of service to be counted for benefit accrual purposes, (i) contrary to the terms of the Pension Plan itself, (ii) despite the fact that it was legal to disregard these years of service under pre-ERISA law after a participant had a pre-ERISA break in service, and (iii) despite the fact that such pre-ERISA years of service can be disregarded under post-ERISA law for vesting purposes. (*Id.*) According to Petitioner, section 203(b)(1)(F) of ERISA, which permits plans to disregard pre-ERISA service if, as in this case, "such service would have been disregarded under the rules of the plan with regard to breaks in service," applies

only when determining whether a participant is vested. (Petition, 7-8). Petitioner asserts that 203(b)(1)(F) of ERISA does not apply when determining an individual's accrued benefit pursuant to section 204(b)(4)(A) of ERISA. (*Id.*)

This issue now presented by the Petition never was properly raised below or ruled upon by either the Sixth Circuit or District Court in this case. (Petition, Apx. 1-30; Opposition, Apx. A at 1a-23a; G at 38a-83a; H at 101a-116a). Petitioner did not include section 204(b) and the issue now raised in the proposed findings of fact and conclusions of law that she submitted on two separate occasions to the District Court, nor did she include it as an issue in her appellate briefs. (*See* District Court Record at 29, 94; Petitioner's Appellate Briefs, Opposition, Apx. G at 38a-83a; H at 101a-116a). Neither the Sixth Circuit nor District Court made any findings of fact or law on the issue. (Petition, Apx. 1-30; Opposition, Apx. A at 1a-23a). Instead, the case below focused on Petitioner's very different claim that she was entitled to the benefits at issue under the terms of the Pension Plan. (*Id.*) The issues ruled upon by the courts below were limited to whether Petitioner was entitled to the benefits under the terms of the Pension Plan, whether Respondent failed to provide Pension Plan documents or otherwise violated ERISA's procedural requirements, and whether Respondent

breached its fiduciary duty by violating the terms of the Pension Plan.[3] (*Id.*)

On January 28, 2003, the day of oral argument before the Sixth Circuit, Petitioner filed a Notice of Supplemental Authority in which she requested for the first time that the Sixth Circuit consider the non-controlling authority of *McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund*, 153 F.Supp.2d 268 (S.D. N.Y. 2001), and the United States District Court for the Southern District of New York's holding that "[a]ccrual of pre-ERISA years of participation is governed by ERISA § 204(b)(1)(D)... " (Opposition, Apx. F at 36a-37a). This was the first point during the proceedings below at which Petitioner attempted to raise the section 204(b) issue now raised in the Petition.

Petitioner acknowledged that her Notice of Supplemental Authority was in direct violation of Sixth Circuit Rule 34(d), which required that any such notice be filed three weeks prior to oral argument. (Opposition, Apx. F at 37a; *see* 6 Cir. R.

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[3] As set forth in Respondent's Statement of the Case, Petitioner attempted on appeal before the Sixth Circuit to raise a new breach of fiduciary duty issue. She suggested, for the first time, that Respondent breached its fiduciary duty by enforcing terms of the Pension Plan in violation of ERISA. (Petition, Apx. 8, 15). The Sixth Circuit expressly refused to consider this issue because it had not been properly presented or ruled upon by the District Court. (Petition, Apx. 16). In any event, the basis for the alleged breach of fiduciary duty that Petitioner attempted to submit to the Sixth Circuit was not section 204(b) of ERISA, 29 U.S.C. §1054(b), but rather 29 U.S.C. §§ 1053(b)(1), 1052(b)(5)(A) and Internal Revenue Code §§ 411(a)(3)(C) and 411(a)(4). (*See* Petition, Apx. 15, 34; Opposition, Apx. B at 24a-27a; C at 28a-29a; G at 78a-82a; and H at 112a-115a). As such, it was an entirely different issue from the issue set forth in the present Petition.

34(d)). Then, as now, she offered no legitimate explanation as to why she had failed to cite the *McDonald* decision or raise the section 204(b) issue in her appellate brief. (*Id.*) Indeed, the *McDonald* decision had been decided one year before the final appellate briefs were filed in this case.[4] Moreover, Petitioner could have raised the section 204(b) issue in the District Court at any time after the inception of this case in 1998, even before *McDonald* was decided, based on the language of section 204(b) itself. Given this situation, the Sixth Circuit properly exercised its discretion and declined to rule on the issue. (Petition, Apx. 1-17).

In summary, the section 204(b) issue raised by the Petition was never considered or ruled upon by either the Sixth Circuit or District Court. Thus, there is nothing for this Court to review. This Court should decline to grant certiorari on an issue that was never properly raised or ruled upon below. *See Pennsylvania Dept. of Corrections, et al. v. Yeskey*, 524 U.S. 206, 213 (1998); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *U.S. v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 149 (1970).

II. The Sixth Circuit's Decision Is Unpublished And Therefore Has No Precedential Value.

The opinion of the Sixth Circuit now challenged by the Petition is unpublished and therefore has no precedential value. *Manufacturers' Indus. Relations Ass'n v. East Akron Casting Co.*, 58 F.3d 204, 208 (6th Cir. 1995). Indeed, the

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[4] The United States District Court for the Southern District of New York's decision in *McDonald* was issued on March 29, 2001. Petitioner's appellate "proof" brief in this case was filed in October of 2001 and final appellate briefs were filed on March 15, 2002.

Sixth Circuit Rules expressly provide that future citation of the opinion in briefs and oral arguments before the Sixth Circuit and district courts within the Circuit is disfavored. *See* 6 Cir. R. 28(g). As such, even if the opinion were otherwise appropriate for review, it is not binding authority on any future court and therefore does not warrant review by this Court.

III. The Sixth Circuit's Decision Does Not Present A Conflict.

Petitioner suggests that there is a conflict in the circuits on the issue raised in the Petition. Specifically, she contends that *McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund*, 320 F.3d 151 (2d Cir. 2003) is in conflict with the Sixth Circuit's decision in this case as well as with *Jones v. UOP*, 16 F.3d 141 (7th Cir. 1994), *Redmond v. Burlington Northern R.R. Co. Pension Plan*, 821 F.2d 461 (8th Cir. 1987), and *Haas & Cass v. Boeing Co.*, No. CA 90-7414, 1992 U.S. Dist. LEXIS 13240 (E.D. Pa. Sept. 3, 1992), *aff'd without op.*, 993 F.2d 877 (3rd Cir. 1993). (Petition, 11-12).

Petitioner's argument that a conflict exists is simply incorrect. First, as discussed above, the Sixth Circuit in this case did not even address or rule on the issue that Petitioner now asserts is in conflict, because the issue was never properly raised below. As such, the Sixth Circuit's decision, which makes no mention of section 204(b) of ERISA or the accrual versus vesting distinction now raised by the Petition, presents no conflict with the Second Circuit's decision in *McDonald*. Moreover, even if it is assumed, *arguendo*, that the Sixth Circuit's decision in this case is somehow inconsistent with *McDonald*, the Sixth Circuit's unpublished decision presents no "conflict" because it has no precedential value and is not indicative of how the Sixth Circuit may rule

in the future. Furthermore, this case is not the proper vehicle for resolving the section 204(b) issue because the lower courts never considered it or made any findings on the issue. (Petition, Apx. 1-30; Opposition, Apx. A at 1a-23a).

In addition, Petitioner's suggestion that this Court should resolve an alleged conflict between *McDonald* and the other cases cited in the Petition is premature. *McDonald*, the decision that is the source of the conflict alleged by Petitioner, was decided by the Second Circuit on February 10, 2003. At this point, the only other Circuit to publish a decision specifically addressing the section 204(b) issue decided in *McDonald* is the Seventh Circuit in *Jones v. UOP,* 16 F.3d 141 (7th Cir. 1994).[5] No other Circuit court has yet considered and addressed *McDonald*.[6] As such, the conflict allegedly presented by *McDonald* is fresh and will likely

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[5] The other Circuit decisions identified by Petitioner as "in conflict" with *McDonald* do not specifically address the section 204(b) issue. In *Redmond v. Burlington Northern R.R. Co. Pension Plan*, 821 F. 2d 461 (8th Cir. 1987), the Eighth Circuit did not specifically consider the effect of section 204(b) on section 203(b)(1)(F) for purposes of benefit accrual. The issue was evidently not raised by the plaintiff in that case. In *Haas & Cass v. Boeing Co.*, 993 F. 2d 877 (3rd Cir. 1993), the Third Circuit affirmed the district court's decision without issuing a written opinion.

[6] In an opinion dated October 17, 2003, the Fifth Circuit held, in a very brief unpublished decision, that section 203(b)(1)(F) of ERISA allows pre-ERISA years of service before a break in service to be disregarded for benefit accrual purposes if such service would have been disregarded under the rules of the plan with respect to breaks in service. *Dorn v. International Paper Co.*, 2003 U.S. App. LEXIS 21053 (5th Cir. Oct. 17, 2003) (unreported). The Fifth Circuit does not specifically reference section 204(b) of ERISA, nor does it refer to the *McDonald* decision.

become more sharply defined or resolve itself if the issue is allowed to percolate in the Circuit courts.

IV. The Sixth Circuit's Decision Is Consistent With The Policy Behind ERISA And With This Court's Directives.

Nothing about the merits of Petitioner's case makes review appropriate. Petitioner suggests that certiorari should be granted because the legislative history of ERISA and the principles articulated in its preamble allegedly require that all pre-ERISA years of employment must be counted for purposes of benefit accrual. (Petition, 12-13). In addition, Petitioner contends that this Court should grant certiorari in order to "enforce its directive" that "vague notions of a statute [sic] 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration." (Petition, 13).

Contrary to Petitioner's suggestion, however, the legislative history of ERISA expressly provides that the rules for pre-ERISA breaks in service are the same for vesting and benefit accrual purposes. The history expressly states, "The rules for breaks in service **for vesting and benefit accrual purposes** may be summarized as follows ..." H.R. Conf. Rep. No. 1280, 93 Congr., 2d Sess. at 5051-52 (1974), S. Rep. No. 1090, 93 Cong., 2d. Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5051-52 (emphasis added). (*See* Opposition, Apx. E at 34a). The report then expressly provides that "[f]or years beginning prior to the effective date of the [ERISA] vesting provisions, a plan may apply the break-in-service rules provided under the plan, as in effect from time to time." (*Id.* at 5052; Opposition, Apx. E at 35a). Accordingly, the result reached by the Sixth Circuit in this case is consistent with the intentions of Congress when it enacted ERISA. Petitioner's

vague notion that the "principles articulated in the statute's preamble" require that pre-ERISA years of service before a break in service be counted for purposes of calculating benefits must be rejected as inconsistent with the legislature's express statements to the contrary.

Petitioner's assertion that "Supreme Court directives" have been ignored must also be rejected as a basis for granting certiorari in this case. Petitioner suggests that "[a]ll Circuits but the Second have ignored this Court's mandate that, where ERISA's language is clear, courts are not to add or subtract from its unambiguous provisions." (Petition, 13). According to Petitioner, faithful interpretation of section 204(b) requires that pre-ERISA years of service prior to a pre-ERISA break in service be counted for purposes of benefit accrual. (*Id.*). However, as already discussed, the Sixth Circuit in this case never ruled upon the effect of section 204(b) of ERISA. (Petition, Apx. 1-17). As such, the "unambiguous" statutory language now relied upon by Petitioner was not at issue and the "directives" identified by Petitioner therefore were not ignored. Petitioner's contention that other Circuits, in other cases, have ignored this Court's directives, is not a reason to grant certiorari in this case.

V. There Is No Evidence That The Issue Raised By The Petition Has Far-Reaching Implications.

Petitioner argues that the issue presented by the Petition has a potentially "enormous impact" on American employees and that the time is "more than ripe" for this Court to resolve the issue. (Petition, 11). However, she offers no supporting authority, other than her own supposition, for her assertion that the section 204(b) issue "has affected and will continue to affect thousands upon thousands of participants." (*Id.*)

Petitioner's speculation and self-serving contention that this is an issue with far-reaching implications do not provide compelling reasons for granting certiorari. Moreover, even if it is assumed, *arguendo*, that the issue presented by the Petition has potentially significant implications, the Sixth Circuit's unpublished decision in this case does not. As discussed in section III above, the Circuit courts should be allowed time to resolve any conflict over this issue in the wake of the Second Circuit's very recent *McDonald* decision.

CONCLUSION

No compelling reason exists for this Court to grant certiorari in this case. The sole issue presented by the Petition could have been raised and ruled upon by the courts below, but was not. Thus, this case would not be a proper vehicle for review of that issue by this Court. The Sixth Circuit's unpublished decision has no precedential value and does not present a conflict with other Circuit decisions. There is no evidence that the issue raised by the Petition has far-reaching implications. Assuming solely for the sake of argument that a significant issue may exist, that issue can be resolved by the Circuit courts and is not ripe for review by this Court. For these reasons, and for the reasons more fully set forth above, Respondent The Western and Southern Life Insurance Company respectfully requests that this Court deny the Petition For A Writ of Certiorari in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-98-866

[Filed Sep. 29, 1999]

SHIRLEY STOLL,
Plaintiff,

v.

THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY,
Defendant.

ORDER

This matter is before the court upon the following motions: defendant's motion to dismiss the original complaint (doc. 5) and plaintiff's opposing memorandum (doc. 11); plaintiff's motion for judgment (doc. 8) and defendant's opposing memorandum (doc. 14); and defendant's motion to dismiss first and second causes of action in amended complaint (doc. 13), plaintiff's opposing memorandum (doc. 25), and defendant's reply (doc. 26). The parties have filed

Proposed Findings of Facts and Conclusions of Law in support of their motions (docs. 28, 29).

Introduction

Plaintiff filed the original complaint in this case on November 18, 1998 (doc. 1). She brought claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1101 et seq., Title VII of the Civil Rights Act of 1964, § 701 et seq., and 42 U.S.C. § 2000 et seq., the Pregnancy Discrimination Act. Defendant moved to dismiss the case on January 4, 1999 (doc. 5). Plaintiff submitted a proposed amended complaint (doc. 7) and filed a motion for judgment as a matter of law on the first, second, and third causes of action of the amended complaint (doc. 8). Defendant subsequently filed its motion to dismiss the first and second causes of action of the proposed amended complaint (doc. 13).

The Court granted plaintiff leave to amend, and she filed her amended complaint on May 19, 1999 (doc. 23). For her first cause of action, plaintiff seeks payment of benefits pursuant to 29 U.S.C. § 1132(a)(1) on the ground that the pre-ERISA Plan in effect at the time of plaintiff's discharge from her employment did not permit or disclose a termination of her accrued service time. Plaintiff alleges as her second cause of action that defendant has breached its fiduciary duty to her by failing to exercise the necessary prudence and by failing to administer the Plan solely in the interest of the participants and beneficiaries as required under 29 U.S.C. §1104(a)(1) and by denying benefits to plaintiff contrary to law. Plaintiff alleges that defendant has failed to process her appeal in a manner consistent with governing regulations, and

that she is therefore entitled to restitution beyond benefits for defendant's breach of duty. As her third cause of action, plaintiff seeks payment of benefits on the ground that defendant failed to provide a Summary Plan Description (SPD) to her prior to her retirement to advise her of her rights under the Plan or to notify her that she would not receive credit for her prior service. Plaintiff also alleges that defendant did not provide notice and disclosure to plaintiff when it forced her to take pregnancy leave and did not allow her to return to work, thereby precluding plaintiff from timing her pregnancy so as to avoid forfeiture of accrued years of service. Finally, as her fourth cause of action, plaintiff alleges that defendant failed to comply with ERISA's procedural requirements in handling her claim.

Undisputed Facts

The undisputed facts giving rise to this lawsuit are as follows: Plaintiff Shirley Stoll was employed by defendant Western & Southern Life Insurance Company (Western & Southern) from June 1954 until February 7, 1969, when she was discharged pursuant to a company policy which required a woman to leave the company when she was five-months pregnant. Plaintiff was 33 years old at the time of her discharge.

Western & Southern's 1968 Plan was in effect on the date plaintiff was discharged. Section 8.10 of the Plan, "Termination of Service", states as follows:

> a. Age 35 - 10 Years' Service - If a member's services are terminated for any cause other than death or retirement after completing ten years of active service

> and on or after his 35th birthday, Western-Southern will issue the member a paid-up deferred annuity policy providing for the payment of a Deferred Annuity on the member's Normal Retirement Date and on the same day in each succeeding month for a guaranteed period of ten years and for so long thereafter as the member shall live...

Doc. 24, Administrative Record, WS 000451.

The 1968 Plan Summary states,

> Upon termination, if you have at least ten years of active service and are age 35 or older, you will receive a Paid-up Deferred Annuity Policy based on your average monthly earnings during the five years immediately preceding termination...

Admin. Record, WS 000029. Section 1.06 of the 1968 Plan defines "Active Service" as "continuous service exclusive of any periods during which the member is entitled to Permanent Disability Benefits." Admin. Record, WS 000434. Section 1.05 defines "Continuous Service" as "the last period of uninterrupted employment with Western-Southern... commencing with the date of such employment and ending with the date of termination of such employment stated in terms of years and days." *Id.*

Plaintiff returned to work at Western & Southern on October 12, 1981.[1] She remained in the company's employ until her retirement in December, 1996. At the time of her retirement, the Western & Southern Life Insurance Company Pension Plan, 1994 Restatement, was in effect. Section 4.7 of the Plan provides as follows:

> Reemployment - - Any former Employee who has ceased to be an Employee shall be considered reemployed (rather than a new Employee for purposes of this Plan) if such individual resumed Employment:
>
> (a) before incurring a Break in Service, or
>
> (b) after a Break in Service but before his number of consecutive Breaks in Service equaled or exceeded the greater of (i) his number of years of Service completed after January 1, 1976 as determined under Section 4.2 hereof or (ii) five consecutive Breaks in Service and such individual completes a year of Service after such break, or
>
> (c) when he already had a vested and nonforfeitable interest in some or all of his Accrued Benefit.

---

[1] Plaintiff alleges that she was precluded from returning to her position after her child was born as a result of a Western-Southern policy not to rehire women who had children at home. Defendant disputes that plaintiff was precluded from returning to work after the birth of her child.

Admin. Record, WS 000559-560. A Break-in-Service is defined under § 4.1 as a Computation Period during which an Employee does not complete more than 500 Credited Hours. Admin. Record, WS 000558. Section 4.1(A) defines a Computation Period as the "12 consecutive month period commencing on the Employee's first date of Employment and each subsequent 12 month period beginning on the anniversary of the Employee's first date of Employment". Admin. Record, WS 000556. Service under the Plan is "credited at a rate of one year for each Computation Period during which an Employee completes at least 1,000 Credited hours. With respect to Service before the Effective Date, in no event shall an Employee be credited with less Service than he had accrued under the Plan of his Participating Employer as constituted on the day of the Effective Date." Section 4.2, Admin. Record, WS 000558.

Section 6.7 of the Plan states as follows:

> Reemployment of Former and Retired Members - - If a former Member or retired Member is reemployed, he shall be treated as set forth in the following subsections:
>
> (a) If the Member did not satisfy any of the reemployment requirements in Section 4.7, upon reemployment he shall be treated as a new Employee for purposes of Article III. If the Member has met the reemployment requirements in Section 4.7(a) or (b), any Service such Member may have had before his most recent Termination Date shall be reinstated. However, years of Service completed before January 1, 1976 will not be added to years of Service completed

> after any Break in Service. If Service is reinstated, then any Years of Membership accumulated during the period of such Service shall also be reinstated.

Admin. Record, WS 000569.

Section 11.1 of the Plan, 1994 Restatement, names the Security Plan Committee as Administrator of the Plan. Admin. Record, WS 000591. Section 11.4 defines the powers of the Security Plan Committee as follows:

> The Security Plan Committee shall have such powers as may be necessary to discharge its duties under the Plan, including but not limited to the power:
>
> (a) to interpret and construe the Plan, to determine all questions with regard to Employment, eligibility, Service, membership, Compensation, Retirement Income, and such factual matters as date of birth and marital status, and similarly related matters for the purpose of the Plan, and the Committee's determination of all questions arising under the Plan shall be conclusive upon all Members, the Company and other interested parties...

Admin. Record, WS 000591.

Upon her retirement, plaintiff was not credited for her years of service with defendant prior to her discharge in 1969 for purposes of calculating her pension benefit. Plaintiff requested that defendant give her credit for her service prior to February 7, 1969. The Security Plan Committee denied her request. Plaintiff appealed the denial to the Security Plan

Appeals Committee. The Committee upheld the denial on the ground that her years of service were credited appropriately according to the provisions of the company's pension plan. Admin. Record, WS 000749.

Claims of the Parties

Plaintiff alleges that at the time of her termination in 1969, she had accumulated 14 years and 8 months of pension benefits. She claims that after her return to work, she accumulated an additional 15 years and 2 months of service, for a total of 29 years and 10 months of service. Plaintiff alleges that defendant has refused to tack the pre-pregnancy termination period of service to her latter period of service, to give her full credit for the total amount of service, and to pay her the full pension due her.

Plaintiff seeks judgment on her first cause of action on the grounds that when she was discharged on February 7, 1969, the governing plan document did not provide for the forfeiture of her accrued service; such Plan is silent with regard to vesting and does not disclose that there will be a loss of credit for time served if a break-in-service occurs; in order to give effect to a pre-ERISA break-in-service rule, the Plan in effect at the time of the employee's retirement must recognize the continuing effectiveness of the rule, which defendant's Plan, 1994 Restatement, does not; application of a break-in-service provision to circumstances beyond an employee's control is arbitrary; and an involuntary break-in-service should not result in a forfeiture of benefits.

As her second cause of action, plaintiff contends that benefits should be paid to her because the Security Plan

Committee breached its fiduciary duty to her by failing to pay benefits under the Plan. She contends that under the terms of the Plan, she is entitled to 29 years and 10 months of service.

In support of her third cause of action, plaintiff contends that defendant is estopped from denying her benefits under equitable principles because it did not publish an SPD which would notify plaintiff that she would have to forfeit credit for her first period of service. Plaintiff alleges that the decision of the Security Plan Committee is not entitled to deference and the de novo standard of review should apply because the Plan is ambiguous and should be construed against defendant; there was no SPD at the time of plaintiff's retirement that would notify her of the specific language that would result in a denial of benefits to her; plaintiff's notice of denial of benefits does not include disclosures required under 29 C.F.R. § 2560.503-1 et seq.; defendant refused to deliver the entire plan document when requested, which violated the requirements of 29 U.S.C. § 1132(c); and plaintiff was denied a full and fair review because she did not have the entire plan during the administrative review or information that was to be given to her upon her denial.

Defendant seeks dismissal of plaintiff's first two causes of action on the grounds that ERISA does not apply to the retirement benefit plan that covers plaintiff's pre-1970 period of employment; recent authority recognizes that claims such as those asserted by plaintiff cannot be maintained; plaintiff's prior period of service could not be added to any subsequent period of service because the terms of the 1968 Plan only count the last period of uninterrupted service in determining an employee's retirement annuity benefits; the Plan in effect at the time plaintiff retired provides for exclusion of the

earlier period of employment from the determination of plaintiff's pension benefits and such provision does not violate ERISA; plaintiff has failed to allege a breach of the terms of any pension plan and pension plan fiduciaries are not liable for following the terms of a plan; ERISA does not proscribe the type of conduct about which plaintiff complains since the proper vehicle for a cause of action based on pregnancy discrimination is the Pregnancy Discrimination Act; and her estoppel claim must fail because assuming there was no SPD in effect at the time of plaintiff's retirement, plaintiff cannot claim reliance or prejudice because she knew in advance of her retirement that her two periods of employment would not be added together to determine her pension benefit.

Standard of Review Applicable to Claims for Denial of ERISA Benefits

Despite the practice long followed in many federal courts, actions based upon an ERISA plan administrator's denial of benefits should not be adjudicated by bench trial or summary judgment. ***Wilkins v. Baptist Healthcare System, Inc.,*** 150 F.3d 609, 617-19 (6th Cir. 1998). The district court ordinarily is limited in such matters to considering the administrative record and should receive new evidence only in very limited circumstances. ***Id.*** at 618. Proceeding as if "conducting a standard bench trial...would inevitably lead to the introduction of testimonial and/or other evidence that the administrator had no opportunity to consider," and would be "inconsistent with ERISA's goal of providing an inexpensive and expeditious method of resolving benefits disputes." ***Id.***

Summary judgment is similarly inapposite in this context, as the trial court need not determine "whether there is a genuine issue for trial." ***Id.*** at 619. Citing ***Perry v. Simplicity Engineering,*** 900 F.2d 963 (6th Cir. 1990), the Court in ***Wilkins*** set forth the following "Suggested Guidelines" to be employed in considering future ERISA actions:

> 1. As to the merits of the action, the district court should conduct a de novo review based solely upon the administrative record, and render findings of fact and conclusions of law accordingly. The district court may consider the parties' arguments concerning the proper analysis of the evidentiary materials contained in the administrative record, but may not admit or consider any evidence not presented to the administrator.
>
> 2. The district court may consider evidence outside of the administrative record only if that evidence is offered in support of a procedural challenge to the administrator's decision, such as an alleged lack of due process afforded by the administrator or alleged bias on its part. This also means that any prehearing discovery at the district court level should be limited to such procedural challenges.
>
> 3. For the reasons set forth above, the summary judgment procedures set forth in Rule 56 are inapposite to ERISA actions and thus should not be utilized in their disposition.

Wilkins, 150 F.3d at 619.

Without the benefit of subsequent decisions implementing these suggestions, the unadorned language of the "guidelines" could cast doubt upon the continued vitality of many aspects of ERISA jurisprudence. Read literally, ***Wilkins*** suggests that "the district court should conduct a de novo review" in all ERISA actions. ***Id.*** Even before ***Wilkins,*** most claims for benefits under ERISA were subject to a de novo standard of review. ***See Firestone Tire & Rubber Co. v. Bruch,*** 489 U.S. 101, 115, 109 S. Ct. 948, 956-57 (1989); ***Anderson v. Teledyne Indus., Inc.,*** 798 F. Supp. 1309, 1317 (N.D. Ohio 1992). An exception was recognized, however, where plan documents expressly granted a plan administrator discretionary authority to determine eligibility for benefits thereunder. ***Id.*** Decisions by a plan administrator with express discretion were considered pursuant to a more deferential "arbitrary and capricious" standard of review. ***See Yeager v. Reliance Standard Life Ins. Co.,*** 88 F.3d 376, 380 (6th Cir. 1996); ***Wells v. United States Steel & Carnegie Pension Fund, Inc.,*** 950 F.2d 1244, 1247-48 (6th Cir. 1991). When the arbitrary and capricious standard applied, a reviewing court affirmed the plan administrator's decision if evidence in the record could be read to provide "a reasoned explanation" for the outcome. ***See Davis v. Kentucky Fin. Cos. Retirement Plan,*** 887 F.2d 689, 693 (6th Cir. 1989) ***(citing Pokratz v. Jones Dairy Farm,*** 771 F.2d 206, 209 (7th Cir. 1995)).

Although the ***Wilkins*** decision does not say that the arbitrary and capricious standard no longer should be applied, neither does it affirmatively recognize any exception to the "suggested" de novo standard of review. ***See Wilkins,*** 150 F.3d at 617-19. Several Sixth Circuit decisions released since ***Wilkins,*** however, have presumed the continued applicability of the arbitrary and capricious standard when the plan

administrator possesses discretionary authority. ***See, e.g., Administrative Comm. of Sea Ray Employees Stock Ownership & Profit Sharing Plan v. Robinson,*** 164 F.3d 981,985-86 (6th Cir. 1999); ***Bagsby v. Central States, SE & SW Areas Pension Fund,*** 162 F.3d 424, 428 (6th Cir. 1998); ***Osborne v. Cyprus Mountain Coals Corp.,*** 166 F.3d 1215, 1998 WL 833769 at **2 (6th Cir. Nov. 19, 1998) (applying the "arbitrary and capricious" standard in reviewing a plan administrator's denial of ERISA benefits). Based thereon, this Court also assumes that the decisions of a plan administrator authorized to exercise discretion in determining eligibility for plan benefits should be upheld unless arbitrary and capricious.

Applicable Law

An ERISA plan must be in writing so that every employee may, upon examining plan documents, determine exactly what his rights and obligations are under the plan. 29 U.S.C. §1102(a)(1); ***Musto v. American General Corp.,*** 861 F.2d 897, 910 (6th Cir. 1988). The unambiguous language of ERISA-governed plans must be given effect. ***Lake v. Metropolitan Life Insurance Co.,*** 73 F.3d 1372, 1279 (6th Cir. 1996). The clear terms of a written pension plan may not be modified or superseded by extrinsic evidence. ***Musto,*** 867 F.2d at 910.

ERISA plan participants must be provided a Summary Plan Description (SPD), which constitutes a binding description and interpretation of an ERISA plan. 29 U.S.C. §1022; ***Edwards v. State Farm Mutual Automobile Insurance Co.,*** 851 F.2d 134, 136 (6th Cir. 1988). Although ERISA was enacted in 1974, it did not require companies to provide SPDs until 1977. ***Sprague v. Gen'l Motors Corp.,*** 92 F.3d 1425,

1436 (6th Cir. 1996). Where an SPD exists and contains language which conflicts with statements in the underlying plan document, the SPD must govern. ***Id.*** at 1434 ***(citing Edwards,*** 851 F.2d 134). Conversely, where the underlying plan document is specific and a summary plan description is silent on a particular matter, the silence of the description is not binding. ***Id. (citing Jensen v. SIPCO, Inc.,*** 38 F.3d 945; 952 (8th Cir. *1994) (quoting Wise v. El Paso Natural Gas Co.,* 986 F.2d 929, 938 (5th Cir. 1993)).

OPINION

Pursuant to ***Wilkins,*** the Court held a hearing on the merits and on the pending motions in open court on August 9, 1999. The Court has reviewed the administrative record and the parties have presented arguments concerning the proper analysis of the evidentiary materials contained in the record with respect to the first three causes of action. These claims are therefore ripe for consideration and resolution on the merits in accordance with the procedure outlined in ***Wilkins***.

The Arbitrary and Capricious Standard of Review Applies in This Case

The court reviews a plan administrator's denial of benefits de novo unless the plan gives the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan. ***Wilkins,*** 150 F.3d at 613 ***(citing Bruch,*** 489 U.S. at 115). The Western & Southern Life Insurance Company Pension Plan, Restated as of January 1, 1989, and effective on plaintiff's retirement date (doc. 15, Exh. 1) vests administration of the Plan in the Security Plan Committee. The Plan grants the Security Plan Committee (Committee) the

power "to interpret and construe the Plan, to determine all questions with regard to Employment, eligibility, Service, membership, Compensation, Retirement Income..." Such language grants the Committee express discretion to interpret terms which may govern eligibility for benefits and to determine eligibility for benefits. ***See, e.g., Lake v. Metropolitan Life Ins. Co.***, 73 F.3d 1372, 1376-77 (6th Cir. 1996) (applicable standard of review depends on whether "the scope of the grant of authority. . . extends. . . to matters of contract interpretation"). Accordingly, the Committee's interpretation of the Plan language is entitled to scrutiny under an "arbitrary and capricious" standard of review. ***See Firestone Tire & Rubber Co.***, 489 U.S. at 115; ***Yeager***, 88 F.3d at 380. Under that standard, the Committee's decision must be affirmed if evidence in the record can be read to provide "a reasoned explanation" for the outcome. ***See Davis***, 887 F.2d at 693.

Defendant is Entitled to Judgment on Plaintiff's First Cause of Action

Plaintiff brings her first cause of action under ERISA, 29 U.S.C. §1132(a)(1), while characterizing her claim as "essentially one of equitable forfeiture". She acknowledges that the Court must determine the parties' rights and responsibilities based on the written governing plan.

After reviewing the entire administrative record, this Court concludes that the record does provide a reasoned explanation for the Committee's denial of plaintiff's request for benefits and therefore entitles defendant to judgment in its favor on plaintiff's first claim for relief. The 1968 Plan provides for a paid-up deferred annuity upon termination at

age 35 or older and after completion of ten years of active service. The Plan makes no provision for crediting earlier years of service after the employee has had a break-in-service. The 1994 Restatement of the Plan, which was in effect at the time of plaintiff's retirement, provides for crediting prior years of service in specified circumstances, none of which apply to plaintiff's situation. Accordingly, the plain language of the 1994 Restatement controls. Pursuant to the Plan, plaintiff is not entitled to credit for years of service completed before 1976.

Plaintiff suggests that the 1994 Plan Restatement violates § 211(e)(2) of ERISA, 29 U.S.C. § 1061(e)(2), because it does not contain language which recognizes the continuing effectiveness of defendant's pre-ERISA break-in-service rule. Plaintiff cites ***Snyder v. Titus,*** 513 F. Supp. 926 (E.D. Va. 1981) as authority for this proposition. In ***Snyder,*** the court noted that when a plan has been amended, eligibility is generally determined using the plan in effect at the time the application for benefits is filed. In that case, however, the trustees applied a break-in-service provision from an earlier plan. The court held that the trustees' decision to apply the rule in the original plan was arbitrary and capricious where the amended plan contained no reference to the original plan and the break-in-service provision of the amended plan conflicted with the break-in-service provision of the original plan.

Several decisions have distinguished ***Snyder*** and declined to follow it where the employer did not dredge up an old break-in-service rule to deny benefits in violation of Congressional policy ***(Kircher v. Concrete Masonry Corp.,*** 767 F.2d 920 (Table)(6th Cir. 1985)(unpublished opinion), the

plan in effect specified which of several plans controlled (***Tanzillo v. Local 617, Internat'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America***, 769 F.2d 140 (3d Cir. 1985)), and a later plan did not specifically incorporate a pre-ERISA break-in-service provision of an earlier plan but the effect of the break-in-service rules in both plans was the same ***(Redmond v. Burlington Northern R. Co. Pension Plan,*** 821 F.2d 461, 468 (8th Cir. 1987)).

Snyder is inapposite to this case. There is no conflict between the 1968 Plan and the 1994 Plan Restatement with regard to breaks-in-service. Neither Plan provides for plaintiff to be credited with her pre-1976 years of service for purposes of calculating her pension benefit. Further, unlike the trustees in ***Snyder,*** the decision-makers in this case did not selectively apply a provision from the 1968 Plan rather than applying the provisions from the Plan in effect at the time of plaintiff's retirement. Nor is there any evidence that the trustees ever construed either Plan to permit crediting of years of service performed prior to 1976 after a break-in-service in situations similar to that of plaintiff. Thus, ***Snyder*** does not support a finding that the 1994 Plan Restatement violates ERISA in any pertinent respect or that application of the break-in-service provision was arbitrary and capricious.

Despite the unambiguous language of the 1994 Plan Restatement, plaintiff alleges that application of the break-in-service rule to her should be struck down as arbitrary since the rule was inadequately disclosed to her before the period when the break occurred. In support of this proposition, plaintiff cites ***Swackard v. Commission House Drivers Local 400,*** 647 F.2d 712 (6th Cir. 1981); ***Hodgins v. Central States Pension Fund,*** 624 F.2d 760 (6th Cir. 1980); ***Reiherzer v.***

Shannon, 581 F.2d 1266 (7th Cir. 1978); and ***Burroughs v. Operating Eng'rs Pension Fund,*** 542 F.2d 1128 (9th Cir. 1976). These cases are [sic] do not support the result urged by plaintiff. In ***Swackard,*** the plaintiff was retroactively denied benefits based on a plan provision when the trustee had previously found the plan containing that provision to be silent with respect to the issue involved. No such prior determination was made in this case. ***Hodgins,*** a non-ERISA case, is also factually distinguishable in that the trustees there had made an inherently inconsistent determination that at some point the plaintiff had ceased to be an employee despite the fact that his employment status had not been obviously altered. In ***Reiherzer,*** the Court found that the trustees had acted arbitrarily in deciding that the plaintiff had suffered a break-in-service because he was "self-employed" since the Plan did not expressly provide that the type of work performed was excluded from the definition of "continued service in the industry" and the trustees' decision was inherently inconsistent. Finally, in ***Burroughs,*** a case brought under the Labor Management Relations Act (LMRA), the Court held that it was fundamentally unfair to apply the break-in-service rule to employees who had no notice of its existence and no reasonable opportunity to protect themselves from its impact during the years to which it was retroactively applied. In the present case, there was no provision at the time of plaintiff's discharge providing for the crediting of her years of service prior to 1976 so that application of a rule precluding credit for those years does not constitute a fundamentally unfair retroactive application of a rule.

Plaintiff also cites a string of cases for the proposition that an involuntary break-in-service should not result in a forfeiture of benefits. ***See Van Fossan v. Teamster Local 710***

Pension Fund, 649 F.2d 1243 (7th Cir. 1981); ***Bolton v. Construction Laborers' Pension Fund for S. Cal,*** 943 F.2d 1117 (9th Cir. 1991); ***Knauss v. Gorman,*** 583 F.2d 82 (3d Cir. 1978); ***Norton v. Machinists Nat'l Pension Fund,*** 553 F.2d 1352 (D.C. Cir. 1977); ***Lee v. Nesbitt,*** 453 F.2d 1309 (9th Cir. 1972); ***Eddington v. CMTA-Independent Tool & Dye Craftsmen Pension Trust,*** 794 F.2d 1383 (9th Cir. 1986); ***Wilson v. Bd. of Trustees,*** 564 F.2d 1299 (9th Cir. 1977); ***Giler v. Bd. of Trustees,*** 509 F.2d 848 (9th Cir. 1975). These cases likewise do not support the result urged by plaintiff. First, a number of these cases were not decided under ERISA. Second, none of the cases suggest that an ERISA plan cannot expressly exclude years of service performed before a break-in-service and pre-ERISA for purposes of calculating pension benefits.

Because plaintiff has not shown that she is entitled to the benefits she seeks under § 1132(a)(1) on the basis of any of the grounds which she has asserted, defendant is entitled to judgment on plaintiff's first cause of action.

Defendant is Entitled to Judgment on Plaintiff's Claim for Breach of Fiduciary Duty

Plaintiff alleges as her second cause of action that defendant breached its fiduciary duty to her by failing to exercise the necessary prudence and by failing to administer the Plan solely in the interest of the participants and beneficiaries as required under 29 U.S.C. § 1104(a)(1), by denying benefits to plaintiff contrary to law, and by failing to process plaintiff's appeal consistent with the relevant regulations. Plaintiff alleges that she is entitled to restitution beyond benefits for defendant's breach of duty. Plaintiff

specifically alleges that the plain language of the 1994 Restatement requires that her prior years of service be added to the years after the break-in-service. Plaintiff characterizes her second cause of action as asserting "simply that the benefits should be paid under the terms and conditions of the Plan."

Assuming plaintiff can pursue a claim for recovery of benefits for breach of fiduciary duty while maintaining a claim for recovery of benefits under § 1132(a)(1), her claim for breach of fiduciary duty must fail. There is a reasonable basis for the determination that plaintiff is not entitled to credit for her prior years of service. The Plan language clearly states that "years of Service completed before January 1, 1976 will not be added to years of Service completed after any Break-in-Service." Additional language in the Plan pertaining to the crediting of years of service does not create an ambiguity with regard to this specific language. Defendant did not breach a fiduciary duty by interpreting the Plan to preclude credit for plaintiff's pre-discharge years of service.

Third Cause of Action

Plaintiff alleges that defendant is estopped from denying benefits to her because it did not provide an SPD to place her on notice that her two periods of service would not be added together. Plaintiff cites no authority to support this claim. Defendant denies that it did not have an SPD in effect at the time of plaintiff's retirement. Defendant also contends that plaintiff cannot establish an estoppel claim because she cannot show that she was prejudiced by the lack of an SPD.

Plaintiff's estoppel claim is without merit. The Administrative Record discloses that in response to a 1989 request by plaintiff for connected service for pension purposes based on her previous service with the company, defendant advised plaintiff that its past and current policies fully comply with ERISA regulations and "it would not be possible to grant your request in view of this situation." Admin. Record, WS 000651. Thus, plaintiff was on notice before her retirement that she would not receive credit for her prior years of service. Defendant's purported failure to provide an SPD which would have disclosed this same information to plaintiff does not justify estopping defendant from denying plaintiff credit for her prior service consistent with its previous representations.

Apparently in connection with her Third Cause of Action, Plaintiff also alleges that the Court should not defer to the decision of the Security Plan Committee because there was no SPD published and in effect at the time of her retirement, she was not provided with information defendant was required to provide in connection with the processing of her appeal of the denial of benefits, defendant did not deliver the entire plan document to plaintiff when requested, and plaintiff did not have the entire plan during the administrative review or the information that was to be given to her upon the denial. As authority for her position, plaintiff cites ***Buttram v. Central States and Southeast and Southwest Areas Health and Welfare Fund,*** 76 F.3d 896 (8th Cir. 1996); ***Halpin v. W. W, Grainger, 962*** F.2d 685, 688 (7th Cir. 1992); ***Conley v. Pitney Bowes,*** 34 F.3d 714 (8th Cir. 1994); and ***Booton v. Lockheed Medical Benefits Plan,*** 110 F.3d 1461 (9th Cir. 1997). ***Buttram*** states that a heightened standard of review may apply where "a serious procedural irregularity existed which...

caused a serious breach of the plan trustee's fiduciary duty to the plan beneficiary" but that plaintiff must come forward with material probative evidence beyond the mere fact of the apparent irregularity and tending to show a breach of a fiduciary obligation before the heightened standard will apply. ***Id.*** at 900. There is no evidence of a serious procedural irregularity coupled with a breach of fiduciary obligation in the record before the Court. The remaining cases stand for the proposition that the decision-maker must provide specific reasons for a denial of benefits in order to comply with the regulations. Plaintiff was provided with a specific reason for the denial of her request for consideration of her previous service. Admin. Record, WS 000749. There is no basis for applying a less deferential standard of review to the Administrator's decision in this case.

The Fourth Cause of Action Remains Pending

The parties have not addressed plaintiff's Fourth Cause of Action alleging that defendant failed to comply with ERISA's procedural requirements in the handling of her claim. This claim therefore remains pending.

Conclusion

In accordance with the foregoing, it is hereby **ORDERED** that defendant's motion to dismiss the original complaint (doc. 5), plaintiff's motion for judgment (doc. 8), and defendant's motion to dismiss Counts I and II of the amended complaint (doc. 13) are **DENIED** as moot in view of the Court's resolution of the merits of plaintiff's claims based on its review of the administrative record and the arguments presented at the ***Wilkins*** hearing. Judgment in favor of

defendant is **GRANTED** with respect to plaintiff's first, second, and third causes of action.

This lawsuit will proceed with respect to plaintiff's fourth cause of action. The parties are **ORDERED** to submit to the Court, within ten days of the date of this Order, a proposed Joint Scheduling Order for the conduct of the litigation of plaintiff's fourth cause of action.

IT IS SO ORDERED.

/s/
HERMAN J. WEBER
UNITED STATES DISTRICT JUDGE

APPENDIX B

Internal Revenue Code §411, 26 U.S.C. § 411 (2003)

§ 411. Minimum vesting standards.

(a) General rule. A trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age (as defined in paragraph (8)) and in addition satisfies the requirements of paragraphs (1), (2), and (11) of this subsection and the requirements of subsection (b)(3), and also satisfies, in the case of a defined benefit plan, the requirements of subsection (b)(1) and, in the case of a defined contribution plan, the requirements of subsection (b)(2).

. . .

(3) Certain permitted forfeitures, suspensions, etc. For purposes of this subsection--

(A) Forfeiture on account of death. A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 401(a)(11)).

(B) Suspension of benefits upon reemployment of retiree. A right to an accrued benefit derived from employer

contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits--

(i) in the case of a plan other than a multiemployer plan, by the employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, the same trade or craft, and the same geographic area covered by the plan as when such benefits commenced.

The Secretary of Labor shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) Effect of retroactive plan amendments. A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 412(c)(8).

. . .

(4) Service included in determination of nonforfeitable percentage. In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under paragraph (2), all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

(A) years of service before age 18;

(B) years of service during a period for which the employee declined to contribute to a plan requiring employee contributions;

(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan (as defined under regulations prescribed by the Secretary);

(D) service not required to be taken into account under paragraph (6);

(E) years of service before January 1, 1971, unless the employee has had at least 3 years of service after December 31, 1970;

(F) years of service before the first plan year to which this section applies, if such service would have been disregarded under the rules of the plan with regard to breaks in service as in effect on the applicable date; and

(G) in the case of a multiemployer plan, years of service--

(i) with an employer after--

(I) a complete withdrawal of that employer from the plan (within the meaning of section 4203 of the Employee Retirement Income Security Act of 1974), or

(II) to the extent permitted in regulations prescribed by the Secretary, a partial withdrawal described in

section 4205(b)(2)(A)(i) of such Act in conjunction with the decertification of the collective bargaining representative, and

(ii) with any employer under the plan after the termination date of the plan under section 4048 of such Act.

. . .

APPENDIX C

ERISA § 202, 29 U.S.C. § 1052 (2003)

§ 1052. Minimum participation standards

. . .

(b)

. . .

(5) (A) In the case of each individual who is absent from work for any period--

(i) by reason of the pregnancy of the individual,

(ii) by reason of the birth of a child of the individual,

(iii) by reason of the placement of a child with the individual in connection with the adoption of such child by such individual, or

(iv) for purposes of caring for such child for a period beginning immediately following such birth or placement,

the plan shall treat as hours of service solely for purposes of determining under this subsection whether a 1-year break in service (as defined in section 203(b)(3)(A) has occurred, the hours described in subparagraph (B).

(B) The hours described in this subparagraph are--

(i) the hours of service which otherwise would normally have been credited to such individual but for such absence, or

(ii) in any case in which the plan is unable to determine the hours described in clause (i), 8 hours of service per day of such absence,

except that the total number of hours treated as hours of service under this subparagraph by reason of any such pregnancy or placement shall not exceed 501 hours.

(C) The hours described in subparagraph (B) shall be treated as hours of service as provided in this paragraph--

(i) only in the year in which the absence from work begins, if a participant would be prevented from incurring a 1-year break in service in such year solely because the period of absence is treated as hours of service as provided in subparagraph (A); or

(ii) in any other case, in the immediately following year.

(D) For purposes of this paragraph, the term "year" means the period used in computations pursuant to section 202(a)(3)(A) [subsec. (a)(3)(A) of this section].

. . .

APPENDIX D

ERISA §204, 29 U.S.C. §1054 (2003)

§1054. Benefit accrual requirements

. . .

(b) Enumeration of plan requirements.

(1) (A) A defined benefit plan satisfies the requirements of this paragraph it the accrued benefit to which each participant is entitled upon his separation from the service is not less than --

(i) 3 percent or the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33 1/3) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years at service, not in excess of 10, for which his compensation was the highest. For purposes of this

subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph --

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the some rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined beneflt plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of --

(i) his accrued benefit determined under the plan, as in effect from time to time prior to the date of the enactment of this Act [enacted Sept. 2, 1974], or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

APPENDIX E

H.R. Conf. Rep. No. 1280, 93 Cong., 2d Sess., (1974), S.Rep. No. 1090, 93 Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5051-52

LEGISLATIVE HISTORY
P.L. 93-406

JOINT EXPLANATORY STATEMENT
OF THE COMMITTEE OF CONFERENCE

. . .

Breaks in service

Under the conference substitute, a 1-year break in service occurs in any calendar year, plan year, or other consecutive 12-month period designated by the plan and applied on a consistent basis (and not prohibited under Labor Department regulations) in which the employee has no more than 500 hours of service. For example, if the plan is on a calendar year basis, and the employee works 1,000 hours in 1976, 501 hours in 1977, 501 hours in 1978, and 1,000 hours or more in 1979, the employee would not have a break in service (although the plan would not be required to accrue benefits or give vesting schedule credit for 1977 or 1978).

The rules with respect to breaks in service for vesting and benefit accrual purposes may be summarized as follows:

(1) If an employee has a 1-year break in service, the plan

may require (for administrative reasons) a 1-year waiting period before his pre-break and post-break service must be aggregated under the plan. However, once the employee has completed this waiting period, he must receive credit for that year (for purposes of vesting and accrued benefit).

(2) In the case of an individual account plan (including a plan funded solely by individual insurance contracts, as well as a "target benefit plan") if any employee has a 1-year break in service, his vesting percentage in pre-break benefit accruals does not have to be increased as a result of post-break service.

(3) Subject to rules (1) and (2), once an employee has achieved any percentage of vesting, then all of his pre-break and post-break service must be aggregated for all purposes.

(4) For all nonvested employees (and subject to rules (1) and (2)), the employee would not lose credits for pre-break service until his period of absence equaled his years of covered service. Under this "rule of parity" for example, if a nonvested employee had three years of service with the employer, and then had a break in service of 2 years, he could return, and after fulfilling his 1-year reentry requirement, he would have 4 years of covered service, because his pre-break and post-break service would be aggregated.

For years beginning prior to the effective date of the vesting provisions, a plan may apply the break-in-service rules provided under the plan, as in effect from time to time. However, no plan amendment made after January 1, 1974, may provide for break-in-service rules which are less beneficial to any employee than the rules in effect under the plan on that date, unless the amendment complies with the break-in service rules established under this bill.

. . .

APPENDIX F

THE PEREZ LAW FIRM CO.

A Legal Professional Association

January 28, 2003

Clerk of the U.S. Court of Appeals -
Sixth Circuit
524 Potter Stewart U.S. Courthouse
100 E. Firth St.
Cincinnati, OH 45202-3988

Re: Shirley Stoll v. Western-Southern Life Insurance Company, Case No.: 01-3401

Dear Clerk:

This is a second notice of supplemental authority and to update the citations. This is made pursuant to 6th Cir. R. 34(d).

Accrual for pre-ERISA break in service rules may not be used to exclude 13 years of pre-ERISA service. Accrual of pre-ERISA years of participation is governed by ERISA § 204(b)(1)(D), 29 U.S.C. § 1054 (b)(1)(D) that provides for accrual of pre-ERISA service in accordance with an employee's years of participation under ERISA's participation provisions 29 U.S.C. § 1052(b) not under the vesting provisions of 29 U.S.C. § 1053(b). *McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund*, 153 F. Supp.2d 268,

2001 U.S. Dist. LEXIS 3500 (2001).

The Appellant requests that this be accepted *nunc pro tunc* because counsel was not aware that the rule required submission three weeks in advance. Thank you for your cooperation. Please call me if you have any questions.

Very truly yours,

/s/_____
Robert Armand Perez Sr.

RAP/llw

Attachment: McDonald decision

c: Katherine Morgan, Esq.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No.: 01-3401
[Filed March 15, 2002]

SHIRLEY STOLL,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
THE WESTERN & SOUTHERN	)
LIFE INSURANCE COMPANY,	)
Defendant-Appellee	)
	)

On Appeal from the United States District Court
Southern District of Ohio Western Division

BRIEF OF PLAINTIFF-APPELLANT
SHIRLEY STOLL

ROBERT ARMAND PEREZ SR.
The Perez Law Firm Co.
7672 Montgomery Road; #378
Cincinnati, OH 45236-4204
(513) 891-8777
Attorney for Plaintiff-Appellant
Shirley Stoll
ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No.: 01-3401

SHIRLEY STOLL,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
THE WESTERN & SOUTHERN	)
LIFE INSURANCE COMPANY,	)
Defendant-Appellee	)
	)

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Fed. R. App. Pro. 26.1, Plaintiff-Appellant, Shirley Stoll makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No

/s/ 3/15/02
Robert Armand Perez, Sr. Date

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Sixth Circuit Brief - dated March 15, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No.: 01-3401

SHIRLEY STOLL,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
THE WESTERN & SOUTHERN	)
LIFE INSURANCE COMPANY,	)
Defendant-Appellee	)
	)

On Appeal from the United States District Court
Southern District of Ohio Western Division

JURISDICTIONAL STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an action arising out of the laws, statutes and regulations of the United States of America. The Southern District of Ohio Western Division, Cincinnati has jurisdiction pursuant to 28 U.S.C.§ 1001 et seq. and 28 U.S.C. 1331 and 28 U.S.C. 1132(e)(1)and (f). The Plaintiff filed a timely Notice of Appeal. This Court has jurisdiction of the case pursuant to 28 U.S.C. § 1291.

Sixth Circuit Brief - dated March 15, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No.: 01-3401

SHIRLEY STOLL,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
THE WESTERN & SOUTHERN	)
LIFE INSURANCE COMPANY,	)
Defendant-Appellee	)
	)

On Appeal from the United States District Court
Southern District of Ohio Western Division

STATEMENT REGARDING ORAL ARGUMENT

The Plaintiff-Appellant with this requests that oral argument be granted in her appeal. This case involves significant procedural and equitable issues.

SUMMARY OF ARGUMENTS

The following is a summary of the issues and related arguments before the Court.

ISSUES AND ARGUMENTS FOR REVIEW

ISSUE I.
WHETHER THE FAILURE TO PROVIDE STATUTORILY REQUIRED NOTICE OR TO FOLLOW THE MANDATED PROCEDURAL REQUIREMENTS OF ERISA VOIDS THE DEFERENTIAL STANDARD OF REVIEW.

ARGUMENT I.
THE FAILURE TO PROVIDE REQUIRED NOTICE AND MANDATED PROCEDURAL REQUIREMENTS VIOLATES DEFERENCE TO A FIDUCIARY'S DETERMINATION.

ISSUE II.
WHETHER PENSION BENEFITS ACCRUED UNDER A PLAN THAT DID NOT PROVIDE CLEAR LANGUAGE TO NOTIFY AN EMPLOYEE THAT HE OR SHE WILL FORFEIT THE BENEFITS RESULTS IN A VESTING OF THOSE BENEFITS.

ARGUMENT II.
BENEFIT PAYMENTS MUST BE MADE FOR VESTED BENEFITS.

ISSUE III.
WHETHER A FIDUCIARY THAT MAINTAINS AND FOLLOWS A PLAN THAT VIOLATES ERISA OR THE RELATED INTERNAL REVENUE CODE PROVISIONS VIOLATES HIS OR HER FIDUCIARY DUTIES.

ARGUMENT III.
WESTERN-SOUTHERN VIOLATED ITS FIDUCIARY DUTY BY FOLLOWING A PLAN THAT VIOLATES ERISA AND/OR THE RELATED INTERNAL REVENUE CODE PROVISIONS.

STATEMENT OF THE CASE

Plaintiff began working at Western-Southern in June of 1954. Amended Complaint. (R.23 Amended Complaint, ¶5, Apx. pg. 00121.)

In February of 1969 Western-Southern terminated the Plaintiff's employment because she was pregnant and it required employment to terminate on or about the twentieth week of pregnancy. Amended Complaint at ¶6-8, Apx. pg. 00121).

The Pension Plan that was in force in 1969 was silent on the issue of vesting but provided for an annuity for those reaching age thirty five with ten years of employment. This document did not tell employees that if they left employment, their service time would be lost. (R.24 Administrative Record, WS00029, Apx. pg. 00492).

Shirley Stoll had fourteen plus years of service at her termination in 1969 but she was several months under thirty

five years of age. The Plan that was in force at the time in 1969 was silent with regard to the accrued benefits and service time. It did not provide any notice that accrued benefits would be lost. The termination was beyond the Plaintiff Shirley Stoll's ability to control. Western-Southern forced her to resign because she was pregnant. (R.90, Declaration of Shirley Stoll, Apx. pg. 00429).

The Plaintiff was re-hired by Western-Southern in 1981. (R.1 Complaint, ¶ 10, Apx. pg. 00017).

On November 7, 1989 William J. Williams who was not involved in pension activities but was a Chief Executive Officer at Western-Southern, in response to an inquiry by Plaintiff, sent a letter denying her claim that **did not** contain the language required under the applicable regulations. (R.24, Administrative Record, WS000651, Apx. pg. 00204). This letter lacked the required regulatory notice in 29 C.F.R. 2560.503-l(f).

> (1) The specific reason or reasons for the denial;
>
> (2) Specific reference to pertinent plan provisions on which the denial is based;
>
> (3) A description of any additional material or information necessary for the Claimant to perfect the claim and an explanation of why such material or information is necessary; and
>
> (4) Appropriate information as to the steps to be taken as to the steps to be taken if the

> participant or beneficiary wishes to submit his or her claim for review.

Williams' letter contained a vague statement "with reference to your request for credit for previous service for pension purposes, our past and current policies are in full conformity with ERISA regulations; so it would not be possible to grant your request in view of this situation. All re-hirees were made fully aware of our policies at the time they were re-hired. We emphasized our policies to them so they would not have any misunderstandings at a later date." (R.24 Administrative Record, WS000651, Apx. pg. 00204). Stoll was not given this information when she was re-hired.

This information from Williams was false and materially misleading. (R.90 Declaration of Stoll ¶¶ 2,3, Apx. pg. 00429, 00430). There was no communication to Plaintiff by anyone throughout this process that stated the Plan language upon which the Defendant now relies.

In December of 1996, Plaintiff retired from her employment at Western-Southern. (R. 23 Amended Complaint ¶10, Apx. pg. 00121). No notification of denial of benefits was given to Mrs. Stoll after her retirement when it was required.

On August 13, I997, Alan Motta on behalf of the Plaintiff sent Western-Southern a letter appealing the denial of Plaintiff' s initial claim and requesting the benefits be paid. (R.24 Administrative Record WS000742, Apx. pg. 00218).

Mr. Motta testified in his deposition that he had no familiarity with the Pension Plan and appeals rights and

process because he worked solely with tax issues. (Motta at TR 16). Mr. Motta did not have knowledge of the Plan Document Plan Provisions that would limit Mrs. Stoll's ability to obtain Benefits on which Western-Southern relies. (Motta at TR 11-14).

Mr. Motta did not have the Summary Plan Description or the Plan during his representation of Mrs. Stoll. (Motta at TR 16, Apx. pg.00456). The record is devoid of any communication to Stoll regarding the process for having her claims paid, how to appeal a denial or the language of the Plan on which it was based.

On August 15, 1997, a letter from Western-Southern informed Plaintiff that Motta's letter had been received and would be considered as an appeal. (R.24 Administrative Record WS000740, Apx. pg. 00217). On October 2, 1997, Western-Southern informed Plaintiff that it was denying her appeal and did not state the sections of the Plan on which the Committee relied, what Plan Document the Committee used or state with particularity the requirements of the regulations. (R.24 Administrative Record WS000749, Apx. pg. 00224).

Plaintiff's trial attorney inquired as to whether there were additional administrative steps available to Stoll and requested:

> "without regard to whether she has any administrative remedies available, we are making a demand for the **entire Plan Document, the Summary Plan Descriptions and any other documents that constitute the Plans from 1954 the date of her first employment to the present.** We make this request

pursuant to 29 U.S.C. 1132 and expect the documents within thirty (30) days of this letter. Please send me the entire Administrative Record, all minutes of the Security Plan Appeal Committee, memos to the Committee, Staff Recommendations and any other documents that comprise the Plan, the Administrative Record or Summary Plan Descriptions.

Please send me a statement of:

(1) The specific reasons for the denial of her benefits;

(2) Specific reference to the pertinent Plan provisions on which you base the denial;

(3) A description of any additional materials that are necessary to have the claim paid; and

(4) Appropriate information regarding the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review."[2]

(R.24 Administrative Record WS00075 1, Apx. pg. 00226).

On May 27, 1998, Defendant stated that Mrs. Stoll had exhausted all of her administrative remedies and the correspondence would be sent to the Legal Department for a response.

---

[2] Required to be given under 29 C.F.R 2560.503-1(f) and (g).

On July 6, 1998, counsel sent another letter to Dean Vonderheide reiterating that:

> "my client reiterates that she wants copies of all the Plans. Thank you for sending the current Plan but to review this matter completely we would like to see the earlier Plans too. We are not sure whether we have all the relevant documents. Please send the Plans and the Summaries and any other documents that comprise the Plan(s) that were in effect throughout Mrs. Stoll's employment.
>
> I have my client's authority to incur charges. Please send them to me with an invoice and I'll assure that it is paid."

(R.24 Administrative Record WS000753, Apx. pg. 00855).

On August 19, 1998, counsel sent another letter to Dean Vonderheide stating:

> "My client demands immediate production **of all of the Plans**. Please be advised that there is a $100.00 a day fine for your failure to produce the Plan Documents within thirty days of request pursuant to 29 U.S.C. 1132(c)(1). You are now much past this deadline. Please provide the **Plans** immediately. If we do not have these in hand by August 23, 1998 we will file suit in Federal Court to obtain the Plans and request attorneys fees in addition to the fine."

(R.24 Administrative Record, Apx. pg. 00187).

By the Defendant's admission, after these repeated requests on September 4, 1998 Dean Vonderheide sent copies of the 1968 Plan, 1969 Summary Plan Description, 1976 Plan and the 1980 Summary Plan Description, but **did not send the 1992 Summary Plan Description**. (R.24 Administrative Record, Apx. pg. 00187). The Defendant has admitted that it negligently omitted the Summary Plan Description for 1992, the applicable period of time of the Plaintiff's retirement and the document that was necessary for her to make a determination with regard to the benefits available to her prior to filing suit. (R.79 Affidavit of Vonderheide, ¶5, Apx. pg.00333).

Throughout this litigation, the Plaintiff has made allegations that the 1992 Summary Plan Description did not exist at the time of Mrs. Stoll's appeal and her retirement. At no time during the initial motions that were filed in this matter did the Defendant rebut this allegation thereby still leaving the wrong impression until these motions that there was no Summary Plan Description in effect at Stoll's retirement.

The Summary Plan Description that was sent to Plaintiff's counsel **did not contain any limitation that would prevent Mrs. Stoll from obtaining benefits.** (R.30 Plaintiff's Factual Appendix in Support of Motion for Summary Judgment p. 9, Apx. pg. 00238).

Vonderheide admitted that the award of benefits to Stoll could not harm the Plan financially. The Plan was over-funded. (Vonderheide at TR 10-11, Apx. pgs. 00457, 00458).

The whole Committee did not have the opportunity to review Stoll's position with regard to the Internal Revenue

Code and Regulations as set forth in the letter by Mr. Motta on behalf of Mrs. Stoll. Only Don Wuebbling reviewed the legal matters. There was no distribution of Mr. Motta's documentation to the entire Committee. This deprived the whole Committee of Stoll's position and Motta's representation. (Kotte at TR 10-11, Apx. pg. 00454, 00455).

Prior to the Court's decision on the breach of fiduciary duty no discovery was afforded to the Plaintiff on the procedural aspects of the handling of her claim and whether there was a breach of fiduciary duty by the Security Plan Committee in its performance of its duty.

Mrs. Stoll has been injured by the failure of the Defendant-Appellee to properly pay her pension benefits. Had she been properly paid, she would have received a lifetime annuity of $1,889.05. She would have also been paid a temporary annuity through November 1, 1998 in the amount of $454.00. Because of the illegal actions of the Defendant-Appellee, she is being paid only $775.49 per month and received only $45.50 for her temporary annuity. (R.24 Administrative Record WS000731-733).

PROCEDURAL POSTURE

This matter was filed in the United States District Court for the Southern District of Ohio on November 18, 1998. (R. 1 Complaint, Apx. pg. 00012). Defendant Western-Southern Life filed a Motion to Dismiss on January 4, 1999. (R.13 Motion to Dismiss, Apx. pg. 00081). The Plaintiff then moved the court to amend the Complaint on February 8, 1999. (R.7 Motion to Amend Complaint). A Motion for Judgment for the Plaintiff was filed on February 16, 1999

(R.8 Motion for Judgment, Apx. pg. 00051). Plaintiff also filed a Motion for the Defendant to Produce the Administrative Record. (R.10 Motion for the Defendant to Produce the Administrative Record).

On May 19, 1999, the court granted the Motion to Amend the Complaint, granted the Motion to Produce the Administrative Record and denied the Defendant's Motion to Dismiss First and Second Causes of Action in the Amended Complaint (R.22 Order, Apx. pg. 00179). The Defendants filed the Administrative Record on May 28, 1999 (R.24 Administrative Record, Apx. pg. 00187). Another Motion to Dismiss was filed by the Defendant Western-Southern on the first and second causes of action on the Amended Complaint on February 17, 1999 (R.13 Motion to Dismiss First and Second Causes of Action, Apx. pg. 00081). The Defendant Western-Southern filed an Answer to the Amended Complaint on February 17, 1999 (R.12, Answer to Amended Complaint, Apx. pg. 00072). Western-Southern also filed a Motion to Dismiss the First and Second Causes of Action in the Amended Complaint on February 17, 1999 (R.13 Motion to Dismiss, Apx. pg. 00081). On May 19, 1999, the court granted the Motion to Amend the Complaint (R.22 Order, Apx. pg. 00179).

A hearing was held pursuant to *Wilkins v. Baptist Hospital* on the pending motions before the Honorable Judge Herman Weber on August 9, 1999 (R.31 minutes). The court issued an order on September 29, 1999 pursuant to that hearing (R.32 Order of Court, Apx. pg.00240). The court denied the Motion to Dismiss dated May 1, Motion for Judgment dated August 1, and Motion to Dismiss First and Second Causes of Action in the Amended Complaint as moot. However,

judgment was granted in favor of the Defendant with respect to Plaintiff's First, Second and Third Causes of Action. The case was ordered to proceed on the Fourth Cause of Action (R.75, Order of Court, Apx. pg. 00300).

Discovery proceeded on the Fourth Cause of Action surrounding the procedural aspects of the handling of the claim of the Plaintiff. After several motions with regard to discovery, discovery was taken. (R.73 Order of the Court).

A motion by the Plaintiff for Summary Judgment on Count Four was filed on August 3, 2000 (R.78 Motion for Summary Judgment, Apx. pg. 00303). A Cross-motion by the Defendant on the same count was filed simultaneously on July 3, 2000 (R.79 Cross Motion for Summary Judgment, Apx. pg. 00315).

Again, Plaintiff and Defendants filed Proposed Finding of Fact and Conclusions of Law. The Defendant filed the Proposed Finding of Fact and Conclusion of Law on July 3, 2000 (R.80 Proposed Finding of Fact and Conclusion of Law). The Plaintiff filed a Memorandum in Opposition to the Motion for Summary Judgment on the Fourth Cause of Action on July 26, 2000 (R.82 Memorandum in Opposition to Motion for Summary Judgment, Apx. pg.00348). The Defendant filed an Opposition to the Plaintiff's Motion for Summary Judgment on July 27, 2000 (R.83 Defendant's Opposition to Plaintiff's Motion for Summary Judgment, Apx. pg. 00360). Replies were filed by both (R.84, R.86 Reply of Plaintiff and Defendant, Apx. pg. 00372 and Apx. pg. 00393).

The Plaintiff filed a Motion before the Court to Reconsider it's Judgment on Count Two of the Amended Complaint on August 14, 2000 (R.85 Plaintiff's Motion to Reconsider, Apx. pg. 00391). The Plaintiff filed a Reply to the Defendant's Opposition on the same date (R.86 Plaintiff's Reply to Defendant's Opposition, Apx. pg. 00393). Defendant opposed the Motion to Reconsideration on Count Two of the Complaint on September 1, 2000 (R.87 Defendant's Opposition to Motion to Reconsider, Apx. pg. 00407).

The court denied the Motion for Reconsideration on Count Two of the Amended Complaint on December 12, 2000 (R.93 Court Order Denying Motion for Reconsideration, Apx. pg. 00434). The court then held a hearing on the Cross-Motions for Summary Judgment on Count Four of the Complaint on March 13, 2001 (R.97 Minutes). As a result, the court granted the Defendant's Motion for Summary Judgment on Count Four of the Plaintiff's Cause of Action dismissing the case at Plaintiff's cost on March 20, 2001 (R.98 Order Granting Defendant Motion for Summary Judgment, Apx. pg. 00438). The Judgment was entered simultaneously on March 20, 2001 (R.99 Judgment, Apx. pg. 00449). The Plaintiff filed a timely Notice of Appeal on April 13,2001 (R.100 Plaintiff' s Notice of Appeal, Apx. pg. 00450).

INTRODUCTORY STATEMENT

The Plaintiff filed an Amended Complaint on May 19, 1999 alleging that she was entitled to benefits pursuant to 29 U.S.C. § 1132(a)(1) because the retirement plan that was in effect at the time of her forcible termination from her employment in 1969 did not give her notice that her accrued

service time would be terminated. Plaintiff asserts that as a result, she is entitled to the payment of her benefits.

Mrs. Stoll alleged in her second cause of action that the Defendant breached it's fiduciary duty to her by failing to administer the Plan solely in the interests of the participants and beneficiaries as required under 29 U.S.C. § 11104(a)(1) by denying her benefits contrary to the law.

The Plaintiff-Appellant Mrs. Stoll for her third cause of action sought the payment of benefits because the Defendant failed to provide her with a Summary Plan Description prior to retirement to advise her of her rights under the Plan or notify her that she would not receive credit for her prior service. Mrs. Stoll further alleged that the Defendant-Appellee Western-Southern did not provide notice or disclosure to her when it forced her to take pregnancy leave and did not allow her to return to work thereby precluding her from timing her pregnancy so as to avoid the forfeiture of accrued years of service.

As her fourth cause of action, the Plaintiff-Appellant alleged that the Defendant-Appellee failed to comply with ERISA's procedural requirements set forth in 29 U.S.C. § 1132 and 29 U.S.C. § 1133 in the processing ofher claim and her appeal.

STANDARD OF REVIEW

This court reviews a District Court's Entry of Summary Judgment *de novo.* See *Sengpeil v. B.F. Goodrich Co.,* 156 F.3d 660, 664 (6th Cir. 1998).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law, Fed. R. Civ. P. 56(C).

The appellate review of any judgment rendered on the administrative record pursuant to *Wilkins v. Baptist Healthcare, et al.,* 1998 FED App. 0236P (6th Cir.) should be under the *de novo* standard.

The determination of ERISA statutes is *de novo. Spacek v. Maritime Ass'n,* 134 F.3d 283,288 (5th Cir. 1998).

STATUTORY HISTORY AND STRUCTURE

Prior to the enactment of ERISA, pension claims were governed by contract law. When presented with a claim, the court simply enforced the bargain that the parties had made.[3] Many courts such as the Sixth Circuit generally viewed a pre-ERISA pension as a unilateral contract that an employee accepted by performance of service and once the service was performed the contract became enforceable. See Annotation *Rights and Liabilities as Between Employer and Employee, with Respect to General Pension or Retirement Plan,* 42 A.L.R. 2d 461, 464 (1955). The discharge of an employee just before reaching retirement or the stated entitlement such as with Stoll who almost had a right to an annuity, would result in liability to the employer under basic principles of

[3] See generally Gilmore, the Ages of American Law 44, 46 (1997).

equity. *Wilson v. Rudolph Wurlitzer Co.,* 48 Ohio App. 450, 194 N.E.441,442 (1934); *Wallace v. Northern Ohio Traction andLight Co.,* 57 Ohio App. 230, 13 N.E. 2d 139 (1937).

Before the enactment of ERISA, The Internal Revenue Code contained restrictions on the ability of an employer to terminate employee benefit plans. The IRS required that the plans were qualified for tax benefits only to the extent as the accrued benefits were non-forfeitable at any termination or discontinuance of contributions. *See* Rev. Rul. 53-33 Part 5(p) 1953-1 C.B. 267, 286; Rev. Rul. 55-186, 1955-1 C.B.39. The Internal Revenue position was that the "exclusive benefit" rule that then, as now, required that Plan assets must be used for the exclusive purpose of providing benefits to employees and their beneficiaries, and that no portion of plan assets would revert to the employer, *ld. See also* 6, *Mertens Law of Federal Income Taxation,* Section 25B. 19 (1990), citing former Treas. Reg. Section 1.401-2(b)(2). This regulation gave some measure of protection to employees and retirees. This IRS rule mandated vesting upon plan termination was codified in 1962 as I.R.C. §401(a)(7). The serious tax law consequences of a plan's disqualification afforded retirees and employees some measure of protection at least to the extent that groups of individuals could not be terminated from the Plan. *Cox, Amendments and Terminations of Pension and Profit Sharing Plans,* 14th N.Y.U. Inst. On Fed. Tax'n 1197-98 (1956); *Tipton & Kalmbach, Inc.*, 83 T.C. 154 (1984).

In 1974 Congress enacted ERISA to remedy some of the basic problems in employee benefit plans. ERISA was designed to achieve several goals. The first being to "protect the interest of participants in employee benefit plans and their beneficiaries" by creating individual statutory rights to

enforce benefit plan obligations and provide appropriate remedies, sanctions and access to federal courts. ERISA § 2(b), 29 U.S.C. § 101 (b). The second goal was to protect the interest of participants and beneficiaries by improving the equitable character of pension plans by regulating their design and operation. ERISA §§ 2(b)(c), 29 U.S.C. §§ 101 (b)(c). In furtherance of this purpose ERISA required disclosure to participants and beneficiaries. ERISA Title I, part 1 §§ 101-11, 29 U.S.C. §§ 1021- 31 and Code § 6057.

ERISA also established obligations and standards of conduct and responsibility for the fiduciaries of employee benefit plans. ERISA Title I, part 4 §§ 401-14, 29 U.S.C. §§ 1011-1114. Finally, ERISA created minimum standards of participation, vesting and funding. ERISA Title I, parts 2 and 3, §§ 201-308, 29 U.S.C. §§ 1051-86. Internal Revenue Code of 1986 as amended IRC §§ 401,410- 19(A). ERISA and the Internal Revenue Code are well integrated. Much of Title I of ERISA, codified at Title 29 U.S.C., was duplicated in Title II, that was codified as amendments to the Internal Revenue Code. Therefore, many of ERISA's provisions on vesting, accrual and funding appear twice in the United States Code. Rule making authority belongs to three agencies, Labor, Treasury, and Pension Benefit Guarantee Corporation. The Internal Revenue Service was given primary jurisdiction and rule-making authority over ERISA's funding, participation, benefit accrual and vesting provisions. ERISA § 3002(c) specifically adopts the regulations promulgated under IRC §§ 410(a), 411 and 412. Regulations promulgated under ERISA further explain the relationship between ERISA and the Internal Revenue Code. See 29 C.F.R. § 2530.200a-2 ("[R]egulations prescribed by the Secretary of the Treasury [under I.R.C. §§ 410 and 411] shall also be used to

implement the related provisions contained in [ERISA]." See *Esden v. Bank of Boston,* 2000 C02.0042346 (2nd Cir. 09/12/2000 Fn.2.).

ARGUMENT

I. FAILURE TO PROVIDE REQUIRED NOTICE AND MANDATED PROCEDURAL REQUIREMENTS VITIATES DEFERENCE TO A FIDUCIARY'S DETERMINATION

It is generally acknowledged that a procedural defect alone in the review of a claim does not provide a Plaintiff with damages. *Lake v. Metropolitan Life Ins. Co.,* 73 F.2d 1372 (6th Cir. 1996). In contrast, a combination of the failure of a Fiduciary to comport with the procedural requirements and failure to comply with the notice provisions require a court to review the decision under the *de novo* standard. *Sanford v. Harvard Industries*, 2001 FED. App. 0284P (6th Cir. 2001). The notice requirements of ERISA are an integral part of the statutory structure of ERISA. The disclosure to participants and beneficiaries is set forth in ERISA Title I part 1 §§ 101-111, 29 U.S.C. §§ 1021-31. Amongst other things, the Notice Section requires that a Summary Plan Description be given to all employees so that they have notice of their benefits and the limitations on their benefits. The declaration of the Plaintiff-Appellant Stoll filed on September 22, 2000 states that at no time during her employment did she ever receive a Summary Plan Description dated 1992. This is the Summary Plan Description that was relevant with the decision with regard to her retirement planning and separation from her second employment with the Defendant-Appellee Western-Southern. Furthermore, this declaration indicates that at no time did she

have any understanding of the Plan Document sections upon which the company was relying to deny her benefits. This notification requirement is integrated into the Fiduciary duty. "A duty to inform a beneficiary or participant in response of beneficiary' s request for information need not even be false to constitute a breach of Fiduciary duty." *Krohn v. Huron Memorial Hospital,* 173 F.3d 542 (6th Cir. 1999). A Fiduciary must give "complete and accurate information in response to a participant's questions. . . ." *Drennan v. General Motors Corp.,* 977 F.2d 246, 251 (6th Cir. 1992). In contrast, Mr. Williams in 1989 informed Mrs. Stoll that it was her Break in Service over one year that precluded her from receiving benefits. This is in fact false.

The structure of ERISA and its regulations that are authorized by this statute has set forth certain requirements of a Fiduciary to inform the participant or beneficiary of the reasons for a denial and the right to appeal, all of which are set forth in 29 C.F.R. 2560.503-1(f). Even when counsel for Mrs. Stoll repeatedly requested the Plan Section upon which the denial was based the Defendant-Appellee refused to provide this information. There were three repeated requests of all of the Plan Documents and advice that there was a penalty under 29 U.S.C. 1132(C)(1) to get the Plan Documents. (R.24 Administrative Record, WS000751, 753, Apx. pg. 00226). Even then the 1992 Summary Plan Description that was the applicable Summary Plan Description was not provided to counsel for the Plaintiff Mrs. Stoll. As a result she filed this litigation. Because the notification of the plan provisions and the reason for the denial was never given to the Plaintiff-Appellant, she was deprived of procedural fairness and a right to a full and fair hearing. *Vanderklok v. Provident Life & Accident Ins. Co., Inc.,* 956 F.2d 610 (6th

Cir. 1992). "When a Plan Administrator does not communicate specific factual reasons for benefits, it is a general principle of ERISA law that Federal Courts will review the Administrator's denial of benefits *de novo,* unless the benefit plan gives the Plan Administrator discretionary authority to determine eligibility for benefits or to construe the terms of the Plan." *Wilkins v. Baptist Healthcare Sys. Inc.,* 15 F.3d 609, 613 (6th Cir. 1998) citing *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989). *Sanford v. Harvard Industries, Inc.,* 2001 FED. App. 0284P (6th Cir.) The cumulative abuse of the Fiduciary duties of the Pension Administration Committee including the denial of benefits by William Williams who did not have the authority to do so requires that any interpretation of ambiguity in a Plan be reviewed *de novo. Buttram v. Central States and Southwest Areas Health and Welfare Fund,* 76 F.3d 896 (8th Cir. 1996). "When a Fiduciary does not follow the law regulations and the procedural provisions of this Statute or the notification procedures the deference that the court may pay disappears. Therefore, the *de novo* standard applies." *Halpin v. W.W. Granger,* 962 F.2d 685,688 (7th Cir. 1992). The failure to comply with the rules and regulations nullifies the deference and results in a *de novo* review. *Conley v. Pitney Bowes,* 34 F.3d 714 (8th Cir. 1994); *Bootin v. Lockheed Medical Benefits Plan,* 110 F.3d 1461 (9th Cir. 1997).

Once the language of the Plan is read *de novo* the section of the Plan upon which the Defendant-Appellant relies to deny benefits must be construed differently. The plain language of the Plan applies. *Firestone v. Tire & Rubber Co. v. Bruch* 489 U.S. 101, 115 (1989). To the extent that a Plan's language is susceptible to more than one interpretation, the rule of *contra proferentum* applies and any ambiguities will be construed

against the Defendant-Appellees. *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550 at 557, in 7 (6th Cir. 1998). The Plan states in Section 6.7 Re-employment of former and retired Members, cited above in the last two sentences that service before 1976 will not be added to service after the break in service but **"if service is reinstated, then any Years of Membership accumulated during the years of such Service shall also be reinstated."** Reading this under the rules of *contra proferentum* Stoll has certainly had her Membership Service reinstated because she is receiving a pension. Her service was reinstated for fifteen years after her break in service. This sentence can only mean when read favorably for her that the years prior to 1976 would be counted with the years after reinstatement. Therefore, she should be entitled to all of her benefits.

The court erred by using the deferential standard despite the language in the Plan because of Williams' involvement in denying benefits, the failure to give adequate notice to Mrs. Stoll in her appeal of the denial, the failure to follow the procedures required under the Statute and the failure of the Defendant- Appellee in general to comport with the notice and disclosure requirements of ERISA. This requires that this section be read favorably for Mrs. Stoll and that her service time prior to 1976 be reinstated and that the Defendant-Appellee be ordered to pay benefits accordingly.

II. BENEFIT PAYMENTS MUST BE MADE FOR VESTED BENEFITS

Appellant Stoll's claims arise out of two separate and distinct but related concepts. Vesting involves the concept of

a definite right to a particular benefit. The vesting requirements are set forth in Internal Revenue Code § 411 (a). There is a separate concept that is used for defining the hours or time in service that is applicable to determine the computation of benefits. This is sometimes called service credit. The computation of service is generally any year in which more than one thousand hours are worked. IRC § 410(a)(3)(2); See 29 C.F.R. §2530.200b-2 et seq.

In the Sixth Circuit, there is a long history of an inference or a presumption of vesting of the pre-ERISA benefits that was articulated by the Sixth Circuit in *UAW v. Yard-man,* 716 F.2D 1476 (1983). Under the teachings of *Yard-man,* when there is ambiguity in a pre-ERISA plan, it should be construed in favor of the Plaintiffs. *Yard-man* also creates a presumption of vesting of employee benefits. Obviously the pre-ERISA plan prior to Stoll's break in service does not comport with the requirements of *Yard-man.*[4] *Yard-man* is a leading case and has been cited approvingly in two subsequent cases including *Helwig v. Kelsey Hayes Company*, 93 F.3d 243 (6th Cir. 1996); *Golden v. Kelsey-Hayles Co.,* 73 F.3d 648 (6th Cir. 1996).

At the time of her forcible employment termination for pregnancy, the Appellant Stoll was thirty-three and one-half years of age and had accrued fourteen years eight months of service credit time (R.30, Plaintiff's Factual Appendix, Exhibit 3, Apx. pg. 00228). In 1969, the Defendant-Appellee Western-Southern maintained a qualified plan under the

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[4] Yard-Man involved the vesting of health benefits that are not subject to the stringent rules of pension benefits in ERISA. There should be a greater presumption for pension benefits.

I.R.C. §§ 411. This is the year the Appellee forcibly terminated the Appellant Mrs. Stoll because of her pregnancy. The document that was in effect in 1969 did not contain any language with regard to service credit. The parties agree that Mrs. Stoll worked for fourteen years eight months with Western-Southern before the company forceably terminated her employment at age thirty-three and one-half years specifically for pregnancy. The Plan Document did not state that this service credit time would be lost if the person separated from the company. What the Plan did do was to provide a special benefit for individuals who had been in the Plan for ten years that had achieved the age of thirty-five. The provision of benefits for this group does not put Mrs. Stoll on notice that the time in service would be lost. She did know that her almost fifteen years of service would be forfeited to the employer. She did not have the ability to conform her employment to assure that her benefits would be maintained because it was the policy of the Defendant-Appellee to forcibly terminate all women who became pregnant. The Plan in effect in 1969 under Section 810 Termination of Service says the following:

> "age 35 - 10 years of service. If a member's services are terminated for any cause other than death or retirement after completing ten years of active service and on or after his thirty-fifth birthday, Western-Southern will issue the member a paid up deferred annuity policy providing for the payment of a Deferred Annuity on the member's Normal Retirement Date and on the same day in each succeeding month for a guaranteed period of ten years and for so long thereafter as the member shall live..."

This did not give notification to employees who did not qualify for this benefit that they would forfeit all of the accrued time in service to Western-Southern. This language does not give notice or the required disclosure. Secondly, the court went on to misconstrue the time and service provision in Administrative Record (R.24, WS00029, Apx. pg. 00187). Section 1.06 of the 1968 plan that defines "active service" as "continuous service exclusive of any periods during which the member is entitled to Permanent Disability Benefits." The trial court read this in conjunction with Administrative Record WS00434 (Apx. pg. 00187). Section 1.05 defining "continuous service" as the "last period of uninterrupted employment with Western-Southern... commencing with the last date of such employment and ending with the date of termination of such employment stated in the terms of years and days." (R.24 Administrative Record, pg. 29, 434, Apx. pgs. 00187).

The trial court erroneously reads this pre-ERISA plan language that gives no notice of the termination of service credit to the employee in conjunction with the post-ERISA plan that is in effect as of 1994 to conclude that Stoll is not entitled to benefits. The court must read the pre-ERISA plan that was in effect when Stoll was discharged independently of any subsequent documents to determine whether it gave her notification of the fact that her service time would be forfeited. As in all matters involving contracts, the federal common law rule of contract construction and interpretation is *contra pro ferentem.* This rule must be applied. Where a written document requires interpretation and construction of terms that are unclear they must be construed most strongly against the person who selected the language. *United States v. Seckinger,* 397 U.S. 203, 216, 90 S.Ct. 880, 25 L.Ed.2d 224.

The federal law of ERISA has adopted this contract construction principle in *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir. 1988). The Sixth Circuit Court of Appeals has adopted the rule of *contra pro ferentem* as a common law of ERISA. *University Hospitals of Cleveland v. Emerson Electric Company and Emerson Electric Company Benefit Plan,* 2000 Fed. App. 09940P (6th Cir.). In its decision the Sixth Circuit specifically held that, "it is not a permissible act of (construction) to augment this language with the additional qualifier that a participant must be 'free of treatment . . . for three months after the effective date of the Plan Coverage.' Rather the terms of the Plan must be construed 'according to their plain meaning, in an ordinary and popular sense, citing *Perez v. Aetna Life Insurance Ins. Co.,* 150 F.3d 550 at 556. (6th Cir. 1998).'" The *Emerson* court further noted that "[T]o the extent that a Plan's language is susceptible of more than one interpretation, we will apply the 'rule of *contra pro ferentem*' and construe any ambiguities against the Defendants-Appellees as the drafting parties. *Perez,* 150 F.3d 550, at 5577, n.7 (6th Cir. 1998)."

There is a clear line of Sixth Circuit cases that support the position that a retroactive application of a break-in-service rule should be struck down as arbitrary and capricious when the rule was inadequately disclosed in the participants before the period in which the break occurred. The equitable principle is that a plan participant employee should have an opportunity to conform his or her actions to the effect of any break in service. *Swackard v. Commission House Drivers Local 400,* 647 F.2d 712, 2 E.B.C. 1317, 1318 (6th Cir.) cert. denied, 454 U.S. 1033 (1981); *Hodgins v. Central States Pension Fund,* 624 F.2d 760 (6th Cir. 1980); *Reiherzerv. Shannon,* 581 F.2d 1266, 1 E.B.C. 1175 (7th Cir. 1978);

Burroughs v. Operating Eng'rs Pension Fund, 542 F.2d 1128, 1 E.B.C. 1258 (9th Cir. 1976), cert. denied, 429 U.S. 1096 (1977).

The trial court erroneously rejected the Plaintiff's position that a pre-ERISA break in service should be included when the participant employee reached normal retirement age. *Snyder v. Titus,* 513 F. Supp. 926, 2 E.B.C. 1269(E.D. Va. 1981).

Now, a recent Third Circuit decision recognizes that this is not only a violation of notice requirements to the Plan Participant but also a statutory violation. In a decision on similar facts, a union member who had a service credit that had been accrued that did not meet a fifteen year service credit requirement was entitled to benefits. The trial court similarly looked at the Plan language and held that the Plan that disregarded the statutory requirements and mandates of ERISA could not be followed. *Smith v. Conti,* 205 F.3d 597 (3rd Cir. 2000). The Third Circuit stated that one of the areas in which ERISA requires express provisions in the benefit plans concerning the non forfeitability, often referred to as "vesting," of normal retirement benefits payable to an employee who reaches the normal retirement age. This is in ERISA § 203(a), 29 U.S.C. 1053(a). This section states "each pension plan shall provide than an employee's right to his normal retirement benefits is non forfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs 1 and 2 of this subsection. (1) a plan satisfies the requirements of this paragraph if an employee's rights and his accrued benefit derive from his own contributions are non forfeitable. (2) a plan satisfies the requirements of this paragraph if it satisfies

the requirements of paragraph (A),(B) or (C). (A) a paragraph satisfies the requirements of this subparagraph if an employee has completed at least ten years of service has a non forfeitable right to 100% of the employee's accrued benefit derived from **the employer's contribution**."[5] ERISA states under the minimum vesting requirements in §§ 203(b)(1) that "in computing a period of service under the Plan for the purposes of determining the non forfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded: . . . (c) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan defined by the Secretary of the Treasury 29 U.S.C.§ 1053(b)(1)." *Smith, Supra* at pp 8-9. The *Smith* court cited the congressional history of ERISA

> "Unless an employee's rights to his accrued pension benefits are non forfeitable, he has no assurance that he will ultimately receive a pension. Thus, pension rights which have been slowly stock piled over many years may suddenly be lost if the employee leaves or loses his job prior to retirement. Quite apart from resulting hardships,... such loses of pension rights are inequitable, since the pension contributions previously made **on behalf of the employee may have been made in lieu of additional compensation or some other benefit which he could have received.**"

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[5] The ten year vesting requirement has been reduced. However, the 1984 Plan was in effect before March 1, 1986 when these current vesting limits then applied. However, this is not really an issue in this case.

S. Rep. No. 93-383, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890,4930. In *Smith,* the Third Circuit went on to state that "although the concepts of accrued benefits and vested benefits are distinct, the concerns expressed by this Court in *Hoover* have force here. *Hoover v. Cumberland, Maryland Area Teamsters Pension Fund,* 756 F.2d 977 (3rd Cir. 1984).

III. WESTERN-SOUTHERN VIOLATED ITS FIDUCIARY DUTY BY FOLLOWING A PLAN THAT VIOLATES ERISA AND/OR THE RELATED INTERNAL REVENUE CODE PROVISIONS

There are several enforcement provisions of ERISA under 29 U.S.C. 1132(A). A related provision is that of ERISA § 409(a), 29 U.S.C. § 1109(a) that provides for liability for a fiduciary for the breach of the fiduciary duty of prudence and care. It allows an employee to recover benefits available under ERISA 502(a)(1)(b), 29 U.S.C. § 1132(a)(2). The Sixth Circuit has repeatedly determined that these claims may co-exist. *Bagsby v. Central States, Southeast and Southwest Pension Fund,* 1998 Fed. App. 0358 pg. 06. Here the court stated "the Court agrees that an alleged breach of fiduciary duty may indeed be relevant to § 502(a)(1)(b) claim for the recovery of individual benefits..." at page 5. Many courts have recently issued decisions that reflect the requirement that fiduciaries operate within the statutory safeguards of ERISA and the related Internal Revenue Code. ERISA plan terms "are circumscribed by statutory requirements and restrictions" and the Plan "cannot contract around the statute" *Esden v. Bank of Boston*, 229 F.3d. 154, 173 (2nd Cir. 2000). Similarly, the Sixth Circuit has held that a "Plan provision

that invalidates the purposes of ERISA may not be followed by a Fiduciary." *Kuper v. Iovenko,* 66 F.3d 1447, 1457 (6th Cir. 1995). "ERISA provides that a Fiduciary may follow that Plan terms to the extent the terms are consistent with ERISA." *Id.* See also, *Fink v. National Sav. & Trust Co.,* 772 F.2d 951,955-56 (D.C. Cir. 1985). The best interest of the participants overrides the ERISA plan documents because the Fiduciary must act in the best interest of the beneficiary plan participants. *Moench v. Robertson,* 62 F.3d 553 (3rd Cir. 1995). Furthermore, the review of a breach of fiduciary duty does not require that the court give deference to the Fiduciary' s determination as it does in a benefits decision. In a claim involving a Fiduciary's lack of prudence, the deferential standard of arbitrary and capricious does not apply. The court must review *de novo. In re. Unisys Savings Plan Litigation,* 173 F.3d 145 (3rd Cir. 1999). The statutory provisions of ERISA provide that a Fiduciary must adhere to a standard of prudence and requires that the duty be discharged "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of the enterprise with like character and with the same aim;. . . " 29 U.S.C. § 1104(a)(1)(B). *Id* at paragraph 24. Many courts have recently held that Fiduciaries must comport with the statutory requirements of ERISA, and its intent without regard to the language of the Plan. "[O]nce having made the determination to provide for such pensions, the Defendants were obligated to formulate a plan complying with ERISA". *Smith v. Conti,* 205 F.3d 597, (3rd Cir. 2000). When an ERISA plan document is not "consistent" with ERISA participants who are entitled to "redress" or "enjoin" them. 29 U.S.C. § 1132(a)(3)(B)(ii).

Claims to enforce ERISA's statutory protections may be brought for violations of ERISA as the Supreme Court recently explained, "But 502(a)(3) admits no limit. . .The focus, instead is on redressing the 'act or practice which violates any provision of ERISA.'" *Harris Trust v. Salomon Smith Barney,* 120 S.Ct. 2180, 2187 (2000). Nothing in ERISA prohibits an employee from suing to obtain Plan benefits by enforcing ERISA itself.

The interpretation of the ERISA statute is a "[t]ask for the Judiciary." *Amaro v. Continental Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984). The court's determination of ERISA's statutory interpretations are *de novo* without giving any deference to administrative committees' determinations of ERISA legal issues. *Spacek v. Maritime Ass 'n.,* 134 F.3d 283,288 (5th Cir. 1998). The Court conducts a *de novo* in order to determine whether the Plan's application comport with ERISA's statutory requirements. *Holt v. Winpisinger,* 811 F.2d 1532, 1536(D.C. Cir. 1987).

Here the Defendant-Appellee Western-Southern's Plan Document violates both the Internal Revenue Code as well as ERISA. The minimum vesting standards that were cited as the reason for a breach of fiduciary duty in *Smith Supra* ERISA § 203(a) also contains sections that are violated by this plan. The ERISA Plan Document that is the subject of the litigation contains the clause upon which the Defendant and the trial court relied ends with "However, years of service completed before January 1, 1976 will not be added to years of service completed after a Break in Service. If Service is reinstated, then any Years of Membership accumulated during such period of Service shall also be reinstated." This violates an applicable ERISA Code § 203, 29 U.S.C. 1053 that states in

sub-section § 203(3)(B)(1), "in computing the period of service under the plan for the purposes of determining the non-forfeitable percentage under sub subsection (a)(2), all of an employee's years with the employer or employers maintaining a plan shall be taken into account except that the following may be disregarded: . . . (e) years of service before January 1, 1971, unless the employee has had at least three years of service after December 31, 1970. . . ."

Mrs. Stoll's years prior to 1969 must be used to compute the determination of her years of service for benefits because she left in 1969 and returned in 1981 and had another fifteen (15) years of Service Credit. These years exceed the three years occurring after 1970 as required by the statutory section. The provision of this plan also violates the IRC § 411 Minimum Vesting Standards. Section 411 contains two statutory sections that are violated by the Plan in it's interpretation. The first is that because there was no termination language in the pre-ERISA plan the termination of that time by this provision violates the anti-cutback rule of the Code under IRC § 411 (a)(3)(C) that prohibits retroactive termination of a right to accrue benefits from employer's contribution and subsequent plan amendments.

Secondly, this section also contains similar language under Service Credit Time in IRC § 411(a)(4) that states "service including the determination of non-forfeitable percentage - in computing the period of Service under the plan for the purpose of determining the non-forfeitable percentage under paragraph (2), all of an employee's years of service with the employer or the employers maintaining the plan shall be taken into account, except that the following may be disregarded

'(e) years of service before January 1, 1971, unless **the employee has three years of service after December 31, 1970. . . .**"

The violation of this Internal Revenue Code Section and the Section of ERISA that is quoted here and above that was the subject of discussion by the Third Circuit in the *Smith* case, requiring that all years of service in an employer who maintained a plan be credited, indicate that the Defendant-Appellee has violated ERISA and the Internal Revenue Code and the Plaintiff-Appellant Mrs. Stoll is entitled to full credit for the years that she worked and benefits related to those years.

In fact, this section under ERISA § 202(b)(5)(A) states that "in the case of an individual who is absent from work for any period - (i) by reason of the pregnancy of the individual, (i) by reason of the birth of a child of the individual,. . . the Plan shall treat as hours of service. . . (b) the hours described in the subparagraph are (1) the hours of service which otherwise would normally have been credited to such an individual but for such absence... except that the total number treated as hours of service under this sub paragraph by reason of any such pregnancy or placement shall not exceed 501 hours." Not only has the Defendant-Appellee failed to credit Mrs. Stoll with the time prior to her pregnancy leave, it is required to credit her with five hundred one hours of Service Credit for that leave based upon an eight hour day.

CONCLUSION

The trial court should not have given deference to the Plan interpretations of the committee. The notice and procedural requirements were violated requiring-that the Fiduciary's deference be vitiated and the benefit determination reviewed *de novo*. *De novo* reading of the Plan Document under the rules of *contra proferentum* require that the pre-1969 service credit be credited to Mrs. Stoll in the determination of her benefits. Additionally, the Fiduciaries breached their duty by having a Plan Document that did not comport with the statutory requirements of ERISA and the Internal Revenue Code. Under the relevant sections of ERISA and the Internal Revenue Code, Mrs. Stoll is entitled to the pre-1969 pension benefits.

WHEREFORE, the Plaintiff-Appellant Mrs. Stoll hereby requests that the Court reverse and remand this to the trial court with instructions to the trial court to order the Defendant-Appellee Western-Southern to properly calculate the pension benefits due Mrs. Stoll according to the terms of the Plan including the pre-1969 years of service with five hundred one hours of additional time credit to her for her pregnancy leave. Furthermore, the Plaintiff-Appellant requests that the Court order the trial court to have all back benefits paid to her with an appropriate interest rate to make her equitably whole.

Dated: March 15, 2002 at Cincinnati, Ohio.

Respectfully submitted,

THE PEREZ LAW FIRM CO. L.P.A.

By: /s/_____

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CERTIFICATE OF SERVICE

I with this certify that a copy of this Plaintiff-Appellant's Brief was mailed and served on the attorney for the Defendant-Appellee below on March 15, 2002:

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/s/_____
Robert Armand Perez, Sr.

Description of Entry	Date	Record	Appendix
VOLUME I			
District Docket Sheet	N/A	N/A	00001
Complaint and Jury Demand	11/18/98	1	00012
Stoll Motion For Judgment	02/16/99	8	00051
Answer to Amended Complaint	02/17/99	12	00072
Western-Southern Motion to Dismiss First and Second Causes of Action in Amended Complaint, with attached exhibits	02/17/99	13	00081
Amended Complaint, with attached exhibits	05/19/99	23	00120
Order	05/19/99	22	00179
Notice of Filing Administrative Record, with excerpts from the Administrative Record. (See Volume II of the Joint Appendix for the Administrative Record)	05/28/99	24	00187

Addendum/Supplement (Factual Appendix)	07/22/99	30	00228
Order Denying Motion to Dismiss	09/29/99	32	00240
Exhibit G (Affidavit of William Williams) to Western-Southern Motion for Protective Order Against Depositions Duces Tecum of Members of Security Plan Appeals Committee and William J. Williams	01/14/00	50	00259
Order	04/11/00	75	00300
Plaintiff's Motion for Summary Judgment, with attached exhibits, including Factual Appendix and exhibits	07/03/00	78	00303
Defendant's Motion for Summary Judgment as to Plaintiff's Fourth Cause of Action, with attached exhibits	07/03/00	79	00315

Memorandum in Opposition to Defendant's Motion for Summary Judgement on Fourth Cause of Action	07/26/00	82	00348
Defendant's Memorandum in Opposition to Motion for Summary Judgment	07/27/00	83	00360
Reply in Support of Defendant's Motion for Summary Judgment	08/04/00	84	00372
Stoll Motion for Reconsideration of Count Two of the Amended Complaint	08/14/00	85	00391
Reply to Response for Motion for Summary Judgment	08/14/00	86	00393

Memorandum in Opposition to Plaintiff's Motion for Reconsideration of Count Two of Amended Complaint, with attached exhibits	09/01/00	87	00407
Reply to Response to Motion for Reconsideration of Count Two of the Amended Complaint	09/22/00	89	00426
Affidavit/Declaration of Shirley Stoll	09/22/00	90	00429
Order	12/12/00	93	00434
Order of Court Denying Motion for Summary Judgment	03/20/01	98	00438
Judgment	03/20/01	99	00449
Notice of Appeal	04/13/01	100	00450

VOLUME II - FILED SEPARATELY

Description of Entry	Date	Record	Appendix
VOLUME II- Administrative Record			
Letter to Perez from Kelly Cahill Timmons of Frost & Jacobs indicating Administrative Record documents bates numbers	May 28, 1999		00462
Notice of Filing Administrative Record w/ Attached Administrative Record in its Entirety	May 28, 1999		00463
WSO00001 - **WS000057**- Western and Southern Life Ins. Co. Employee and Dependents Security Plan, Sept. 1968			00464-520
WS000285- **WS000337**- Western Southern Life Ins. Co. Employee and Dependents Security Plan, Sept. 1980			00521-573

WS000360- **WS380** - Western Southern Life Ins. Co. Pension Plan - 1992 Summary Plan Description	00574-594
WS000432 - **WS000456**- Western Southern Life Ins. Co. Pension Plan - 1968	00595-619
WS000515 - Western Southern Life Ins. Co.Security Plan Certificate	00620
WS000516- **WS000541** - Western Southern Life Ins. Co. Employee and Dependents Security Plan	00621-646
WS000542 - **WS000641** - Western Southern Life Ins. Co. Pension Plan, 1989/1994	00647-746

WS000642 - **WS000650** - Western Southern Life Ins. Co. Employee Records/ Modified Security Plan Coverage/Absentee Records	00747-755
WS000651 - Letter to Stoll from Williams, No. 7, 1989	00756
WS000652 - **WS000654 -** Western Southern Message and/or Transmittal Forms	00757-759
WS000655 - memo to "Chan" Headley from Williams, Oct. 23, 1989	00760
WS000656- **WS000657-** Memo to Williams from E.C. Headley, Nov. 2, 1989	00761-762

WS000658 -
Attachment to
Nov. 2, 1989
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from E.C. Headley -
"Procedure B:
Re-employed Personnel) 00763

WS000659-
WS000660- Letter to
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from Stoll,
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WS000661-
Retirement Information
for Stoll,
Dec. 14,1996 00766

WS000662 - Letter to
Stoll from John Barrett,
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WS000663 -
WS000664- Notice of
Associate Payroll
Deduction,
Nov. 27, 1996 00768-769

WS000665 -
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WS000666 -
Letter to Stoll from
John Barrett,
Dec. 12, 1996 — 00771

WS000667 -
WS000668 -
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Payroll Deduction,
Nov. 27, 1996;
Dec. 18, 1996 — 00772-773

WS000672 -
Stmt. Of Pension
Earnings and
Deductions,
Dec. 14, 1996 — 00774

WS000673-
WS000674- Western
Southern Life Ins. Co.
Pension System Master Record
Status Report, Run date
Dec. 18, 1996 — 00775-776

WS000675 -
WS000681 - Retirement
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WS000683 -
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Data and Enrollment Form — 00784-785

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WS000688 - Letter to Mary Scott from Stoll, Oct. 15, 1996	00790
WS000689- **WS000694** - Retirement Calculation	00791-796
WS000695 - **WS000696** - Explanation of Retirement Welfare Benefits, Feb. 8, 1996	00797-798
WS000697- **WS000704**- Retirement Calculation	00799-806

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WSO00706-
Summary and Estimate
of Retirement Welfare
Plan Benefits,
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Retirement Annuity Options 00809-811

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Note to Jennie from Mary re:
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WSO00 711 -
WSO00 713 -
Retirement
Calculation 00813-815

WS000714-
WS000725- Annuity Options
and Explanation 00816-827

WS000726-
WS000728 - Application for
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WS000729 - **WS000730** - Employee Status Record, Dec. 13, 1996	00831-832
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WS000735- **WS000736**- Family Maintenance Sheets	00837-838
WS000737- Claim Appeal Summary, Aug. 13,1997	00839

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WS000739- Memo to Williams from E.C. Headley and attachment, Nov. 2, 1989 — 00840-841

WS000740 - Letter to Stoll from Security Plan Dept., Aug. 15, 1997 — 00842

WS000741 -
WS000747- Faxed Letter from Motta to Vonderheide — 00843-849

WS000748- Copy of Envelope sent Certified Mail to Vonderheide from Motta — 00850

WS000749 - Letter to Stoll from Hayes, Oct. 2, 1997 — 00851

WS000750 - Letter to Vonderheide and Hayes from Perez, May 21, 1998 — 00852

WS000751 -
Letter to Vonderheide
from Perez, Jul. 6, 1998 00853

WS00752 -
WS000753- Letter to
Perez from Vonderheide,
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WS000754 -
Letter to Perez from
Vonderheide,
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Name of Deponent	*Page where Testimony Begins in Deposition*	*Page where Testimony Begins in Appendix*
Noreen J. Hayes Filed 07/28/00	Vol. I, P.6, 25	00452
John Harold Kotte, M.D. Filed 07/03/00	Vol. I, P. 10-11	00454
Alan C. Motta Filed 07/03/00	Vol. I, P.23	00456
Dean F. Vonderheide Filed 07/07/00	Vol. I. P.10-11, 17, 22	00457
Donald Wuebbling Filed 07/03/00	Vol. I. P.10	00461

Sixth Circuit Brief - dated March 15, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No.: 01-3401

SHIRLEY STOLL,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
THE WESTERN & SOUTHERN	)
LIFE INSURANCE COMPANY,	)
Defendant-Appellee	)
	)

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(B)and(C)

Now comes the Plaintiff-Appellant by and through counsel and hereby certifies that the foregoing Brief comports with the word limitations of FRAP 32(a)(7)(B)and(C) because the word count of the brief is considerably less than 14,000 words and per the computer is approximately 8,000.

/s/ 3/15/02

Robert Armand Perez, Sr. Date

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No.: 01-3401
[Filed March 15, 2002]

SHIRLEY STOLL,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
THE WESTERN & SOUTHERN	)
LIFE INSURANCE COMPANY,	)
Defendant-Appellee	)
	)

On Appeal from the United States District Court
Southern District of Ohio Western Division

REPLY BRIEF OF PLAINTIFF-APPELLANT SHIRLEY STOLL

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ORAL ARGUMENT REQUESTED

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SUMMARY OF ARGUMENTS

A faithless fiduciary is not entitled to deference. Western-Southern admits it involuntary terminated Mrs. Stoll because she was pregnant yet insists Mrs. Stoll is not entitled to equity under the law. Western-Southern maintains that even though it never gave proper notification to Mrs. Stoll, failed to provide her with the Plan documents supporting their position, failed to tell Mrs. Stoll why it was denying its benefits and the plan provisions upon which it relied and failed to give her attorney the applicable Summary Plan Description that is essential for the review of the case and failed to bring this failure to the Court's attention until 19 months after the initiation of litigation and approximately 2 years after he started representing Mrs. Stoll, the Court should still treat it deferentially.

Mrs. Stoll suggests this is not the law.

Western-Southern may not ignore all its responsibilities under the law, its fiduciary duties of care, prudence and truthful disclosure and still be paid the deference it requests. This is simply not within the statutory structure of the clearly-reticulated statute of ERISA that was passed in 1974 to protect pension plan benefits for employees. ERISA exists to prohibit employers from making unfair and inequitable decisions. Western-Southern may not elude the close scrutiny of the Federal courts because it placed some self-serving words into a Plan document. A document that is not in compliance with the law of ERISA or the I.R.C.

ISSUE I.

WHETHER THE FAILURE TO PROVIDE STATUTORILY REQUIRED NOTICE OR TO FOLLOW THE MANDATED PROCEDURAL REQUIREMENTS OF ERISA VOIDS THE DEFERENTIAL STANDARD OF REVIEW.

ARGUMENT I.

The complete and utter failure of Western-Southern to inform Mrs. Stoll and tell her what was going on or to respond with her concerns deprived her of a full and fair hearing. The failure of Western-Southern to provide her with information throughout the process requires the Court to strip Western-Southern's claimed deferential treatment that it believes is the result of self-serving terminology it placed in a plan document-a document that it did not distribute to Mrs. Stoll nor did it use to make its decision.

To Mrs. Stoll's concerns, Western-Southern responded with conclusory gobbledygook. After Mrs. Stoll requested that she be credited for the time for which she worked for Western-Southern, she was not given a valid reason as to why she could not be paid. Despite the fact that she was forced out of her position and unable to obtain an annuity because Western-Southern Insurance committed what it admits is a clearly illegal act[1], Williams responded, "with reference to your request for credit for previous service for pension

[1] For the purposes of equity whether it was a legal act in 1969 is of no consequence because it was illegal when benefits were denied.

purposes, our past and current policies are in full conformity with ERISA regulations, so it would not be possible to grant your request in view of this situation. All re-hirees were made fully aware of our policies at the time that they are re-hired. We emphasized our **policies** to them so that they would not have any misunderstandings at a later date." (R.24, Administrative Record, WS000651, Apx. pg. 00204).

Williams did not refer to the Plan documents as a basis for his denial. He was not the individual who was responsible for making this decision. Indeed, Western-Southern admits that Williams' involvement was wrong and aberrant. Not only was this information from Williams false and misleading, because the Plan document does not state what he says it states, Stoll was not given this information at any time during her re-hire and did not reevaluate this when she was re-hired from her previous termination. (R.23, Amended Complaint ¶10, Apx. pg.00121).

Mr. Motta, the attorney who handled the appeal to Western-Southern, said in his appeal letter that Western-Southern violated Internal Revenue Code § 411. Mr. Motta maintained that this rule of parity was violated. His letter on page 3 states the required vesting rules for a plan to satisfy I.R.C. § 411. In particular, Mr. Motta states that under § 411.4 the service that must be included in determination of non-forfeitable percentage is as follows: "in computing the period of service under the Plan for purposes of determining a non-forfeitable percentage under paragraph (2), all the employees years of service with the employer or employers maintaining a plan shall be taken into account except the following may be disregarded... (e) years of service before January 1,1971 unless the employee has had at least three

years of service after December 31, 1970. . . ." Motta concludes that because Stoll has had more than three years post-December 31, 1971 service (she had 15 years after 1971), this statutory section requires that Western-Southern must pay Stoll. Stoll still maintains that this statute requires that she be paid.

In response to Stoll's Appeal, Western-Southern concluded with a letter dated October 2, 1997 from Norene J. Hays who stated that "the security plan appeals committee has reviewed the facts surrounding your case and the provisions of our pension plan. It is apparent that you were employed with Western-Southern between 1954 and 1969. You terminated your employment in 1969 and returned to the organization in 1981. You retired on December 14, 1996. At that point in time, you were credited with 15 years of service, which is consistent with the provisions of our pension plan. It is important to note that the manner in which your retirement benefit was handled does comply with all ERISA legislation covering pension plans. Because your years of service were credited appropriately according to the provisions of our Plan, we are not able to honor your request for additional credited service at this time." (R.1, Exhibit "A").

Throughout this process, the Plan provisions supporting this decision were not cited to Stoll or her counsel. There was no reference to the Plan provisions. It wasn't until the Western-Southern filed a Memorandum in Opposition to the Plaintiff's Motion for Judgment, Motion for Continuance and Motion to Order Defendant to Produce and File the Administrative Record that there was any indication of any basis in the Plan documents for its denial of benefits to Stoll.

(R.14). This was filed on March 8, 1999, approximately four months into the litigation.

It wasn't until 19 months into the litigation that Western-Southern finally admitted that it had not provided the Summary Plan Description that is essential for the prelitigation evaluation of a case under the teachings of *Edwards v. State Farm Mot. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988). Now, Western-Southern states that the Summary Plan Description had been provided in the Administrative Record, although not provided prior to the litigation. Mrs. Stoll was given this document buried within hundreds of pages of other documents. Nevertheless, Vonderheide in his deposition admits that you can't really tell the difference between the various Summary Plan Descriptions. (Deposition of D. Vonderheide p. 21)

Under the teachings of State Farm, the Summary Plan Description controls. The 1998 Summary Plan Description given to Stoll per her request prior to the filing of this matter contained no language that prevents Stoll from getting her benefits. For all these reasons, the benefits should be paid.

ISSUE II.

WHETHER PENSION BENEFITS ACCRUED UNDER A PLAN THAT DID NOT PROVIDE CLEAR LANGUAGE TO NOTIFY AN EMPLOYEE THAT HE OR SHE WILL FORFEIT THE BENEFITS RESULTS IN THE VESTING OF THOSE BENEFITS.

ARGUMENT II.

Benefit payments must be made for vested benefits. Under both the Sixth Circuit law and the Ohio State law there is a long history of liability an interference with pension rights and a presumption of the vesting of retirement benefits. In fact, had Mrs. Stoll brought a non-ERISA state court action against Western-Southern at her termination in 1969, she would have perhaps prevailed. *Wilson v. Rudolph Wurlitzer Co.*, 48 Ohio App. 450, 194 N.E. 441,442 (1934); *Wallace v. Northern Ohio Traction and Light Co.*, 57 OhioApp. 13 N.E.2d 139 (1937). Ohio law recognized the vesting of pension benefits. These rights could not be taken away from an employee through termination. The presumption of vesting of these rights is reflected in the Sixth Circuit decisions, *UAW v. Yard-man,* 716 F.2d 1476 (6th Cir. 1983). *Helwigv. Kelsey Hayes Co.,* 93 F.3d 243 (6th Cir. 1996); *Golden v. Kelsey-Hayes Co.,* 73 F.3d 648 (6th Cir. 1996).

The Plan that was in place in 1969 did not put Mrs. Stoll on notice that it intended to deprive Mrs. Stoll of her benefits when it terminated her for being pregnant. Western-Southern thinks the language that says, "if the facts were different then we would have given you something" is the equivalent of stating, "when we fire you, you lose all your accrued benefits." The latter is the kind of notice that the law requires. *Snyder v. Titus,* 513 F. Supp. 926, 2 E.B.C. 1269 (E.D. Va. 1981).

Given the history of ERISA, the history of Ohio State Law and the facts before this Court, for Western-Southern to be able to create a forfeiture of these benefits, it had to have clear and unequivocal rights in the Plan that was in existence

in 1969. This Plan had to have given clear notice to Mrs. Stoll. It did not. The whole purpose of protection of pension benefits is frustrated by the trial court's decision in this case. It ignores the legislative history, the fundamental principles of equity that have been most recently articulated again by this Court in *Helfrich v. PNC Bank, Kentucky, Inc.* No. 00-5148 (6th Cir. 10/01/2001)(October 1, 2001).

The trial court clearly ignored the key teachings of the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S.101 (1989). *Firestone* requires this Court to use the plain language of the Plans.[2] The trial court jumbled together a 1969 document with parts of a later 1994 document to find some rationale for the decision of the administrators. The reality is, the administrators did not give their rationale, they did not rely on the Plan documents or if they did, they did not state the sections and language of the Plan, they did not provide the notification requirements required under 29 C.F.R. 1260.503-1, nor did they comport with any requirements under 29 U.S.C. 1132-1133. The Plan was not referred to in the Administrative Record. Nevertheless, Western-Southern believes that because it puts come magic self-serving language into a Plan document that no one read or saw, nor is it referred to throughout this process that it somehow cloaked with some magical powers.[3]

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[2] The *Firestone* Court states that the use of deference instead of a *de novo* review is the exception not the rule.

[3] This is similar to a two-year old child who believes that because he has his favorite blanky he is unable to be seen by anyone around him and therefore, can do anything he wants.

ISSUE III.

WHETHER A FIDUCIARY THAT MAINTAINS AND FOLLOWS A PLAN THAT VIOLATES ERISA OR THE RELATED INTERNAL REVENUE CODE PROVISIONS VIOLATES HIS OR HER FIDUCIARY DUTIES.

ARGUMENT III.

Here, Western-Southern violated its fiduciary duties by following a Plan that violates ERISA and the related Internal Revenue Code provisions. Western-Southern maintains that this argument was not raised at the Trial Court level. This is false. Mr. Motta raised the issue of the violation of IRC 411 in his letter to the Administrative Committee in Stoll's appeal. See *supra*. Under the teachings of *Wilkins v. Baptist Healthcare Sys., Inc,* 150 F.3d 609 (6th Cir. 1998), the trial court should have concentrated on this document because it is the core of the Administrative Record. The trial court did not. Secondly, this was again raised by the Plaintiff in the Plaintiff's Reply. (R.84, Apx. pg. 00372). It was incorporated by reference in the Plaintiff's Motion for Reconsideration filed August 4, 2000. (R.85, Apx. pg. 00391). Again, Western-Southern misrepresents the facts to the Court. What is clear is that the Appeals Committee did not consider any of the points raised by Motta. It merely rubber-stamped the decision of the CEO, William Williams, that misstated, misinformed and did not provide the required notification to Mrs. Stoll. This is precisely the type of misbehavior that has been found to be wrongful by this Court in *Sanford v. Harvard Industries,* 262 F.3d 590 (6th Cir. 2001). The Chief Executive Officer of Western-Southern made a decision that

was wrong. It was subsequently rubber-stamped by his General Counsel without the participation of the entire Committee. Any distinction from *Harvard* is a distinction without a difference.

Again, Western-Southern uses convolution of the Plan language to justify its misbehavior. It quotes that the Plan Committee may "appoint or employ...any individuals to assist in the administration of the Plan including all the duties described in the 'Committee's "powers"'... and any other agents it deems advisable, including legal, accounting, an actuarial counsel." (R.24, 1994 Plan at ¶11.4(d), Admin. Record at WS000592, Apx. 00187). Furthermore, Western-Southern cites another plan section that states the **fiduciary** "may rely on any such direction, information, or action of another fiduciary as being proper under the Plan and it is not required under the Plan to inquire into the proprietary of such direction." (R.24, Article IX, 1994 Plan at ¶9.4, Admin. Record at WS000587, Apx 00187.) A plain reading by a non-biased observer can only conclude that under the first sentence, "outside consultants may be retained to provide advice to the Committee", the second sentence states that "another fiduciary may be substituted for the current fiduciary." At no time, does it suggest that the legal counsel for the CEO may direct the Committee[4] to rubber-stamp the CEO's wrongful decision.

Finally, Western-Southern is just flat out wrong when it says that a benefits claim cannot co-exist with a fiduciary Claim. The origin of this misconception is from the *dicta* in

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[4] The whole committee is the fiduciary, not an individual member.

Varity v. Howe, 516 U.S.C 489 (1996) where the Supreme Court, in its holding, found liability on the part of the Company for lying to its employees is a breach of fiduciary duty.[5] This illogic was debunked by this Court in the decision of *Krohn v. Huron Memorial Hospital,* 173 F.3d 542 (6th Cir. 1999). Although Western-Southern cites the *Krohn* case, in its brief, it is clear that it never read the case because in *Krohn,* the Sixth Circuit specifically found that ERISA fiduciaries have a duty to disclose and to inform Plan participants of information that is material to their decision making. The Sixth Circuit wrote, "we agree with the conclusion of our sister circuits that the duty to inform is a constant thread in the relationship between the beneficiary and trustees; it entails not only a negative duty not to misinform, but an affirmative duty to inform when the trustee knows that silence might be harmful." *Krohn v. Huron Memorial Hospital*, 176 F.3d 548, citing *Bixler v. Central Pa. Teamsters Health & Welfare Fund,* 12 F.3d 1292, 1300 (3rd Cir. 1993). The *Krohn* Court also found that these two claims may co-exist.[6] Mrs. Stoll urges this Court to enforce the statute and make Western-Southern comport with its fiduciary duties that are concomitant with its rights.

Now, Western-Southern wishes the Court to excuse its failure to perform its duties. Western-Southern recklessly asks for the right to be treated with deference. This in spite of the

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[5] Western-Southern, as a matter of logic, must admit that Stoll has a valid claim for benefits because if she did not have a valid claim for benefits only then could she have a fiduciary benefits claim?

[6] Western-Southern confuses compensatory damages with restitution for benefits lost in a breach of fiduciary duty.

fact that it misinformed, did not inform, and mishandled its responsibilities in violation of its fiduciary duties under the prudent man standard. It now wishes to be treated as if it were above suspicion. But, duties precede rights.[7]

CONCLUSION

Mrs. Stoll urges this Court to pierce the sophistry of Western-Southern. She respectfully requests this Court to examine, *de novo,* the Plan, the statutes, and the regulations and conclude that she must be paid these pension benefits for which she is legally and equitably entitled. Mrs. Stoll seeks something for which she worked almost 30 years[8] and for which she is entitled. These are pension benefits that ERISA exists to protect and shield. Benefits that she would have been entitled to litigate successfully had Western-Southern been clear and truthful in 1969. Had Western-Southern told her at the time it terminated her, because she was going to have a child, that they were going to strip her of all her rights for which she had worked for almost 15 years she could have litigated in state court with success.

Finally, we request that the Court observe the teachings of the Supreme Court in *Mertins v. Hewitt Associates,* 508 U.S.248 (1993) and do equity. The law in equity is well established. Equity abhors a forfeiture. Mrs. Stoll merely requests that equity be done and Western-Southern is without clean hands.

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[7]Moses Maimonides, 1135-1204.

[8] 14+ years prior to 1969 and 15 years later.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I with this certify that a copy of this Reply Brief of Plaintiff-Appellant was mailed and served on the attorney for the Western-Southern below on March 15, 2002:

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